To amend the Internal Revenue Code of 1986 and the Employee Retirement Income Security Act of 1974 to modify the requirements for multiple employer plans, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 17, 2018

Mr. COTTON (for himself, Mr. YOUNG, Ms. HEITKAMP, and Mr. BOOKER) introduced the following bill; which was read twice and referred to the Committee on Finance

A BILL

To amend the Internal Revenue Code of 1986 and the Employee Retirement Income Security Act of 1974 to modify the requirements for multiple employer plans, and for other purposes.

Be it enacted by the Senate and House of Representa-
tives of the United States of America in Congress assembled,

SECTION 1. MULTIPLE EMPLOYER PLANS.

(a) Qualification Requirements.—

(1) In general.—Section 413 of the Internal Revenue Code of 1986 is amended by adding at the end the following new subsection:
“(e) Application of Qualification Requirements for Certain Multiple Employer Plans With Pooled Plan Providers.—

“(1) In general.—Except as provided in paragraph (2), if a defined contribution plan to which subsection (c) applies—

“(A) is sponsored by employers all of which have both a common interest other than having adopted the plan and control of the plan, or

“(B) in the case of a plan not described in subparagraph (A), has a pooled plan provider, then the plan shall not be treated as failing to meet the requirements under this title applicable to a plan described in section 401(a) or to a plan that consists of individual retirement accounts described in section 408 (including by reason of subsection (c) thereof), whichever is applicable, merely because one or more employers of employees covered by the plan fail to take such actions as are required of such employers for the plan to meet such requirements.

“(2) Limitations.—

“(A) In general.—Paragraph (1) shall not apply to any plan unless the terms of the plan provide that in cases of employers failing
to take the actions described in paragraph (1)—

“(i) the assets of the plan attributable to employees of the employer will be transferred to a plan maintained only by the employer (or its successor), to an eligible retirement plan as defined in section 402(c)(8)(B) for each individual whose account is transferred, or to any other arrangement that the Secretary determines is appropriate, unless the Secretary determines it is in the best interests of such employees to retain the assets in the plan, and

“(ii) the employer described in clause (i) (and not the plan with respect to which the failure occurred or any other participating employer in such plan) shall, except to the extent provided by the Secretary, be liable for any liabilities with respect to such plan attributable to employees of the employer.

“(B) Failures by Pooled Plan Providers.—If the pooled plan provider of a plan described in paragraph (1)(B) does not perform
substantially all of the administrative duties which are required of the provider under paragraph (3)(A)(i) for any plan year, the Secretary, in the Secretary’s own discretion, may provide that the determination as to whether the plan meets the requirements under this title applicable to a plan described in section 401(a) or to a plan that consists of individual retirement accounts described in section 408 (including by reason of subsection (c) thereof), whichever is applicable, shall be made in the same manner as would be made without regard to paragraph (1).

“(3) POOLED PLAN PROVIDER.—For purposes of this subsection—

“(A) IN GENERAL.—The term ‘pooled plan provider’ means, with respect to any plan, a person who—

“(i) is designated by the terms of the plan as a named fiduciary (within the meaning of section 402(a)(2) of the Employee Retirement Income Security Act of 1974), as the plan administrator, and as the person responsible to perform all administrative duties (including conducting
proper testing with respect to the plan and employees of each participating employer) which are reasonably necessary to ensure that—

“(I) the plan meets any requirement applicable under the Employee Retirement Income Security Act of 1974 or this title to a plan described in section 401(a) or to a plan that consists of individual retirement accounts described in section 408 (including by reason of subsection (c) thereof), whichever is applicable, and

“(II) each participating employer takes such actions as the Secretary or such person determines are necessary for the plan to meet the requirements described in subclause (I), including providing to such person any disclosures or other information which the Secretary may require or which such person otherwise determines is necessary to administer the plan or to allow the plan to meet such requirements,
“(ii) registers as a pooled plan provider with the Secretary, and provides such other information to the Secretary as the Secretary may require, before beginning operations as a pooled plan provider,

“(iii) acknowledges in writing that such person is a named fiduciary (within the meaning of section 402(a)(2) of the Employee Retirement Income Security Act of 1974), and the plan administrator, with respect to the plan, and

“(iv) is responsible for ensuring that all persons who handle assets of, or who are fiduciaries of, the plan are bonded in accordance with section 412 of the Employee Retirement Income Security Act of 1974.

“(B) AUDITS, EXAMINATIONS, AND INVESTIGATIONS.—The Secretary may perform audits, examinations, and investigations of pooled plan providers as may be necessary to enforce and carry out the purposes of this subsection.

“(4) GUIDANCE.—

“(A) IN GENERAL.—The Secretary shall issue such guidance as the Secretary determines
appropriate to carry out this subsection, including guidance—

“(i) to identify the administrative duties and other actions required to be performed by a pooled plan provider under this subsection,

“(ii) which describes the procedures to be taken to terminate a plan which fails to meet the requirements to be a plan described in paragraph (1), including the proper treatment of, and actions needed to be taken by, any participating employer of the plan and the assets and liabilities of the plan with respect to employees of that employer, and

“(iii) identifying appropriate cases to which the rules of paragraph (2)(A) will apply to employers failing to take the actions described in paragraph (1).

The Secretary shall take into account under clause (iii) whether the failure of an employer or pooled plan provider to provide any disclosures or other information, or to take any other action, necessary to administer a plan or to allow a plan to meet requirements applicable to
the plan under section 401(a) or 408, whichever is applicable, has continued over a period of time that clearly demonstrates a lack of commitment to compliance.

“(B) PROSPECTIVE APPLICATION.—Any guidance issued by the Secretary under this paragraph shall not apply to any action or failure occurring before the issuance of such guidance.

“(5) MODEL PLAN.—Not later than June 30, 2019, the Secretary shall, in consultation with the Secretary of Labor when appropriate, publish—

“(A) model plan language which may be adopted by a plan to which subsection (c) applies and which is not described in paragraph (1)(B), in order for the plan to qualify for the application of this subsection, and

“(B) model plan language which meets the requirements of this subsection and of paragraphs (43) and (44) of section 3 of the Employee Retirement Income Security Act of 1974 and which may be adopted in order for a plan to be treated as a plan described in paragraph (1)(B).”
(2) CONFORMING AMENDMENT.—Paragraph (3) of section 413(b) of such Code is amended by striking “section 401(a)” and inserting “sections 401(a) and 408(c)”.

(3) TECHNICAL AMENDMENT.—Subsection (c) of section 408 of such Code is amended by inserting after paragraph (2) the following new paragraph:

“(3) There is a separate accounting for any interest of an employee or member (or spouse of an employee or member) in a Roth IRA.”.

(b) NO COMMON INTEREST REQUIRED FOR POOLED EMPLOYER PLANS.—Section 3(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(2)) is amended by adding at the end the following:

“(C) A pooled employer plan shall be treated as—

“(i) a single employee pension benefit plan or single pension plan; and

“(ii) a plan to which section 210(a) applies.”.

(c) POOLED EMPLOYER PLAN AND PROVIDER DEFINED.—

(1) IN GENERAL.—Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C.
1002) is amended by adding at the end the follow-

“(43) POOLED EMPLOYER PLAN.—

“(A) IN GENERAL.—The term ‘pooled em-
ployer plan’ means a plan—

“(i) which is an individual account

plan established or maintained for the pur-
pose of providing benefits to the employees
of two or more employers;

“(ii) which is a plan described in sec-

tion 401(a) of the Internal Revenue Code
of 1986 which includes a trust exempt
from tax under section 501(a) of such
Code or a plan that consists of individual
retirement accounts described in section
408 of such Code (including by reason of
subsection (c) thereof); and

“(iii) the terms of which meet the re-
quirements of subparagraph (B).

Such term shall not include a plan with respect
to which all of the participating employers have
both a common interest other than having
adopted the plan and control of the plan.

“(B) REQUIREMENTS FOR PLAN TERMS.—
The requirements of this subparagraph are met
with respect to any plan if the terms of the plan—

“(i) designate a pooled plan provider and provide that the pooled plan provider is a named fiduciary of the plan;

“(ii) designate one or more trustees meeting the requirements of section 408(a)(2) of the Internal Revenue Code of 1986 (other than a participating employer) to be responsible for collecting contributions to, and holding the assets of, the plan and require such trustees to implement written contribution collection procedures that are reasonable, diligent, and systematic;

“(iii) except as provided in section 404(e), provide that each participating employer retains fiduciary responsibility for—

“(I) the selection and monitoring in accordance with section 404(a) of the person designated as the pooled plan provider and any other person who, in addition to the pooled plan provider, is designated as a named fiduciary of the plan; and
“(II) to the extent not otherwise delegated to another fiduciary by the pooled plan provider and subject to the provisions of section 404(c), the investment and management of that portion of the plan’s assets attributable to the employees of that participating employer;

“(iv) provide that a participating employer, or a participant or beneficiary, is not subject to unreasonable restrictions, fees, or penalties with regard to ceasing participation, receipt of distributions, or otherwise transferring assets of the plan in accordance with section 208 or paragraph (44)(C)(i)(II);

“(v) require—

“(I) the pooled plan provider to provide to participating employers any disclosures or other information which the Secretary may require, including any disclosures or other information to facilitate the selection or any monitoring of the pooled plan provider by participating employers; and
“(II) each participating employer to take such actions as the Secretary or the pooled plan provider determines are necessary to administer the plan or for the plan to meet any requirement applicable under this Act or the Internal Revenue Code of 1986 to a plan described in section 401(a) of such Code or to a plan that consists of individual retirement accounts described in section 408 of such Code (including by reason of subsection (c) thereof), whichever is applicable, including providing any disclosures or other information which the Secretary may require or which the pooled plan provider otherwise determines is necessary to administer the plan or to allow the plan to meet such requirements; and

“(vi) provide that any disclosure or other information required to be provided under clause (v) may be provided in electronic form and will be designed to ensure only reasonable costs are imposed on
pooled plan providers and participating employers.

“(C) EXCEPTIONS.—The term ‘pooled employer plan’ does not include—

“(i) a multiemployer plan;

“(ii) a plan established before January 1, 2016, unless the plan administrator elects that the plan will be treated as a pooled employer plan and the plan meets the requirements of this title applicable to a pooled employer plan established on or after such date; and

“(iii) a plan with respect to which all of the participating employers have both a common interest other than having adopted the plan and control of the plan.

“(44) POOLED PLAN PROVIDER.—

“(A) IN GENERAL.—The term ‘pooled plan provider’ means a person who—

“(i) is designated by the terms of a pooled employer plan as a named fiduciary, as the plan administrator, and as the person responsible for the performance of all administrative duties (including conducting proper testing with respect to the plan and
employees of each participating employer) which are reasonably necessary to ensure that—

“(I) the plan meets any requirement applicable under this Act or the Internal Revenue Code of 1986 to a plan described in section 401(a) of such Code or to a plan that consists of individual retirement accounts described in section 408 of such Code (including by reason of subsection (c) thereof), whichever is applicable; and

“(II) each participating employer takes such actions as the Secretary or pooled plan provider determines are necessary for the plan to meet the requirements described in subclause (I), including providing the disclosures and information described in paragraph (43)(B)(v)(II);

“(ii) registers as a pooled plan provider with the Secretary, and provides to the Secretary such other information as the Secretary may require, before beginning operations as a pooled plan provider;
“(iii) acknowledges in writing that such person is a named fiduciary, and the plan administrator, with respect to the pooled employer plan; and

“(iv) is responsible for ensuring that all persons who handle assets of, or who are fiduciaries of, the pooled employer plan are bonded in accordance with section 412.

“(B) AUDITS, EXAMINATIONS, AND INVESTIGATIONS.—The Secretary may perform audits, examinations, and investigations of pooled plan providers as may be necessary to enforce and carry out the purposes of this paragraph and paragraph (43).

“(C) GUIDANCE.—

“(i) IN GENERAL.—The Secretary shall issue such guidance as the Secretary determines appropriate to carry out this paragraph and paragraph (43), including guidance—

“(I) to identify the administrative duties and other actions required to be performed by a pooled plan provider under either such paragraph; and
“(II) which requires in appropriate cases that if a participating employer fails to take the actions required under subparagraph (A)(i)(II)—

“(aa) the assets of the plan attributable to employees of the participating employer are transferred to a plan maintained only by the participating employer (or its successor), to an eligible retirement plan as defined in section 402(c)(8)(B) of the Internal Revenue Code of 1986 for each individual whose account is transferred, or to any other arrangement that the Secretary determines is appropriate in such guidance; and

“(bb) the participating employer described in item (aa) (and not the plan with respect to which the failure occurred or any other participating employer in such plan) shall, except to the ex-
tent provided in such guidance, be liable for any liabilities with respect to such plan attributable to employees of the participating employer.

The Secretary shall take into account under subclause (II) whether the failure of an employer or pooled plan provider to provide any disclosures or other information, or to take any other action, necessary to administer a plan or to allow a plan to meet requirements described in subparagraph (A)(i)(II) has continued over a period of time that clearly demonstrates a lack of commitment to compliance. The Secretary may waive the requirements of subclause (II)(aa) in appropriate circumstances if the Secretary determines it is in the best interests of the employees of the participating employer described in such clause to retain the assets in the plan with respect to which the employer’s failure occurred.
“(ii) Prospective Application.—
Any guidance issued by the Secretary
under this subparagraph shall not apply to
any action or failure occurring before the
issuance of such guidance.

“(D) Aggregation Rules.—For purposes
of this paragraph—

“(i) In general.—In determining
whether a person meets the requirements
of this paragraph to be a pooled plan pro-
vider with respect to any plan, all persons
who are members of the same controlled
group and who perform services for the
plan shall be treated as one person.

“(ii) Members of common group.—
Persons shall be treated as members of the
same controlled group if such persons are
treated as a single employer under sub-
section (c) or (d) of section 210.”.

(2) Bonding requirements for pooled em-
ployer plans.—The last sentence of section 412(a)
of the Employee Retirement Income Security Act of
1974 (29 U.S.C. 1112(a)) is amended by inserting
“or in the case of a pooled employer plan (as defined
in section 3(43))” after “section 407(d)(1))”.

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(A) in paragraph (16)(B)—

(i) by striking “or” at the end of clause (ii); and

(ii) by striking the period at the end and inserting “, or (iv) in the case of a pooled employer plan, the pooled plan provider.”; and

(B) by striking the second paragraph (41).

(d) Effective Date.—

(1) In General.—The amendments made by this section shall apply to years beginning after December 31, 2019.

(2) Rule of Construction.—Nothing in the amendments made by subsection (a) shall be construed as limiting the authority of the Secretary of the Treasury or the Secretary’s delegate (determined without regard to such amendment) to provide for the proper treatment of a failure to meet any requirement applicable under the Internal Revenue Code of 1986 with respect to one employer (and its employees) in a multiple employer plan.
SEC. 2. LIMITATION ON EMPLOYER LIABILITY.

Section 404 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1104) is amended by adding at the end the following new subsection:

“(e)(1) Except as provided in paragraph (2), an eligible employer (as defined in section 408(p)(2)(C)(i) of the Internal Revenue Code of 1986) participating in a registered pooled employer plan shall not be treated as a fiduciary with respect to such plan, including with respect to the selection or monitoring of any plan service provider or any investment under the plan, if—

“(A) the employer selected the registered pooled employer plan from the Department of Labor Internet website established under paragraph (6);

“(B) the pooled plan provider of such plan receives no more than reasonable compensation for its services; and

“(C) the employer is not the pooled plan provider or a plan service provider for the plan.

“(2) Notwithstanding paragraph (1), eligible employers participating in such a registered pooled employer plan shall be responsible for—

“(A) ensuring, at the time of entering into the participation agreement and periodically thereafter (not less frequently than annually and upon any agreed-to change in the compensation of the pooled
plan provider), that the compensation received by
the pooled plan provider pursuant to the participa-
tion agreement is reasonable;

“(B) meeting the enrollment requirements ap-
plicable to such employer under the plan;

“(C) transmitting contributions to the plan in a
timely manner in accordance with the terms of the
plan;

“(D) providing such information and assistance
as is within the sole control of the eligible employer
and is needed by the plan to operate in accordance
with the plan document; and

“(E) providing such other information or assist-
ance as may be required in regulations prescribed by
the Secretary.

“(3) For purposes of this subsection, the term ‘reg-
istered pooled employer plan’ means a pooled employer
plan if the pooled plan provider—

“(A) agrees in the plan document to—

“(i) comply with all requirements applica-
ble to a pooled plan provider under this title
and the Internal Revenue Code of 1986;

“(ii) assume all fiduciary responsibility for
the plan (except as retained by the eligible em-
ployer under paragraph (2)) with respect to
such eligible employer, including for the prudent selection and monitoring of investments and negotiation of reasonable fees;

“(iii) serve as the plan sponsor for purposes of this title; and

“(iv) notify the eligible employer reasonably in advance of the obligations of both the employer and the pooled plan provider under the pooled employer plan;

“(B) submits all key plan information requested by the Secretary under paragraph (5);

“(C) would not be precluded for any other reason from acting as a fiduciary of the plan under this title; and

“(D) either—

“(i) has fiduciary liability insurance with a per-claim limit which is at least—

“(I) the greater of 5 percent of plan assets or $1,000,000; or

“(II) such other amount as is determined by the Secretary by regulation; or

“(ii) is—

“(I) a bank, as defined in section 202(a)(2) of the Investment Advisers Act of 1940, that has the power to manage, ac-
quire, or dispose of assets of a plan, and
that has, as of the last day of its most re-
cent fiscal year, equity capital in excess of
$1,000,000;

“(II) a savings and loan association,
the accounts of which are insured by the
Federal Savings and Loan Insurance Cor-
poration, that has made application for
and been granted trust powers to manage,
acquire, or dispose of assets of any plan by
a State or Federal authority having super-
vision over savings and loan associations,
and that has, as of the last day of its most
recent fiscal year, equity capital or net
worth in excess of $1,000,000;

“(III) an insurance company subject
to supervision and examination by a State
authority having supervision over insur-
ance companies that is qualified under the
laws of more than 1 State to manage, ac-
quire, or dispose of assets of a plan, and
that has, as of the last day of its most re-
cent fiscal year, net worth in excess of
$1,000,000; or
“(IV) an investment adviser registered under the Investment Advisers Act of 1940 that, as of the last day of its most recent fiscal year, has total client assets under its management and control in excess of $85,000,000, and shareholders’ or partners’ equity in excess of $1,000,000.

“(4)(A) In the case of a registered pooled employer plan that substantially fails to comply with the requirements of paragraph (3), the Secretary shall provide notification to the pooled plan provider with an explanation of the noncompliance and actions needed to return to compliance.

“(B) If the plan fails to return to compliance with paragraph (3) within 90 days of receiving the notification under subparagraph (A), the Secretary shall remove the plan from the website established under paragraph (6) and provide notification to all participating employers that the plan no longer qualifies them to be relieved of fiduciary duty under paragraph (1), and if they desire such relief they must select another registered pooled employer plan listed on such website.

“(C) The Secretary shall promulgate regulations as necessary to ensure that timely notification is provided to eligible employers pursuant to subparagraph (B) and in
the case of a registered pooled employer plan that terminates registration.

“(5)(A) The Secretary, in consultation with the Secretary of the Treasury, shall determine the information that a pooled employer plan must submit in order to be included on the website established under paragraph (6), including sufficient information for employers and participants to evaluate and compare plans.

“(B) The information required under subparagraph (A) may be provided in any reasonable manner or pursuant to regulations issued by the Secretary. The Secretary shall take reasonable efforts to ensure the collection of such information is not unduly burdensome for pooled plan providers while balancing the needs of employers and participants, and to ensure that the information requested does not discriminate in favor of certain providers with respect to the type of investments or investment strategies offered.

“(6)(A) Not later than the date that is 1 year after the date of the enactment of this Act, the Secretary, in consultation with the Secretary of the Treasury, shall make publicly available an Internet website to provide key plan information for plans that qualify as pooled employer plans (including contact information) to employers searching for a plan in which to participate.
“(B) The website established under this paragraph shall include, in a timely manner, all plans that qualify as pooled employer plans and that have submitted in full, on an annual basis and at the time of any material change, the information described in paragraph (5). Such website shall enable users to search pooled employer plans based on the information submitted under paragraph (5), including whether the pooled plan provider of the plan has accepted the additional fiduciary responsibilities described in paragraph (3)(A). The Secretary shall take reasonable efforts to ensure that the information on the website is written in a manner calculated to be understood by the average plan participant, and is sufficiently accurate and comprehensive to reasonably apprise participants and beneficiaries of their rights and obligations under each plan.

“(C) The submission of information for inclusion on such website by a plan shall be voluntary, except in the case of a plan seeking treatment as a registered pooled employer plan.”