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Submitted via email

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Re: Application of Qualification Requirements to Pooled Employer Plans and Request for Guidance Under Internal Revenue Code Section 413(e)(3)(D)

Dear Carol and Rachel:

The American Benefits Council ("the Council") is writing to request that the U.S. Department of the Treasury and Internal Revenue Service (IRS) issue guidance in the near term under Internal Revenue Code Section 413(e)(3)(D),[1] which was added to the Code by the Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019.[2] We wanted to follow up on the excellent call we had with Treasury and IRS on October 15, 2020, regarding this issue.

As discussed below, the Council believes that Section 413(e)(3)(D) has important implications for the manner in which the Code's qualification requirements apply to pooled employer plans (PEPs), the new subset of multiple employer plans (MEPs) created by the SECURE Act effective January 1, 2021. As further discussed below, both the statutory language and broader retirement policy support an interpretation of Section 413(e)(3)(D) under which PEPs are treated differently from other types of MEPs (referred to herein as "pre-existing MEPs") in certain regards, including with respect to the application of the Code's rules related to the crediting of service for eligibility and

[1] Unless indicated otherwise, all references to "Section" herein refer to a Section of the Internal Revenue Code of 1986, as amended.

[2] The SECURE Act was enacted as part of the Further Consolidated Appropriations Act, 2020 (P.L. 116-94) (December 20, 2019).

vesting. Due to the importance of this issue for both employers contemplating whether to join a PEP and service providers preparing to administer PEPs, we urge Treasury and the IRS to issue guidance as soon as is practicable clarifying that Section 413(e)(3)(D) has the meaning described below.

The 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.

SUMMARY OF COMMENTS

In order to give effect to the language in Code Section 413(e)(3)(D) (providing treatment of each employer in a plan which has a pooled plan provider as the plan sponsor with respect to the portion of the plan attributable to employees of such employer), the Council believes that the statutory text is best interpreted as follows:

> With respect to PEPs, Section 413(e)(3)(D) overrides certain pre-existing MEP rules in Section 413(c), including paragraphs (1) (relating to all employers in a MEP being treated as employed by a single employer for purposes of participation) and (3) (relating to all employers in a MEP being treated as employed by a single employer for purposes of vesting), that would otherwise apply to PEPs in the absence of Section 413(e)(3)(D).

As discussed in more detail below:

- The above interpretation is compelled by the language of the statute. We believe the above interpretation is the only interpretation that gives effect and meaning to the Section 413(e)(3)(D) statutory provision.
- The above interpretation is supported by the policy reasons behind the creation of PEPs, which were ultimately concerned with expanding retirement plan coverage. Furthermore, the above interpretation reasonably reflects and accommodates key differences between PEPs and pre-existing MEPs and the issuance of guidance supporting the above interpretation is important in facilitating the expansion of plan coverage that Congress sought.

I. A TECHNICAL ANALYSIS OF THE STATUTE SUPPORTS THE CONCLUSION THAT CODE SECTION 413(e)(3)(D) MODIFIES FOR PEPS THE APPLICATION OF THE QUALIFICATION REQUIREMENTS SET FORTH FOR MEPS IN SECTION 413(c).

A. Background on relevant SECURE Act changes

Section 413(e) was added to the Code by the SECURE Act and generally provides a means for pre-existing MEPs and PEPs to avoid the disqualification of the entire plan by reason of one or more employers covered by the plan failing to take actions required for meeting the Code's qualification requirements. Section 413(e) also introduces the concept of a PEP to the Code and further describes in Section 413(e)(3) the meaning, responsibilities and implications of a "pooled plan provider" (PPP), the presence of which is necessary in order to have a PEP. The Council's comments herein focus on Section 413(e)(3)(D), which provides the following:

> (D) TREATMENT OF EMPLOYERS AS PLAN SPONSORS. — Except with respect to the administrative duties of the pooled plan provider described in subparagraph (A)(i), each employer in a plan which has a pooled plan provider shall be treated as the plan sponsor with respect to the portion of the plan attributable to employees of such employer (or beneficiaries of such employees).

In addition to amending the Code, the SECURE Act amended the Employee Retirement Income Security Act of 1974 (ERISA) to clarify how PEPs are treated for certain purposes under ERISA. These ERISA amendments include:

- providing definitions of "pooled employer plan" and "pooled plan provider" in ERISA Sections 3(43) and 3(44), respectively;
- specifying in ERISA Section 3(2)(C) that a PEP (a) is treated as a single plan for purposes of ERISA and (b) is a plan to which ERISA Section 210(a) applies; and
- amending the definition of "plan sponsor" in ERISA Section 3(16)(B) to provide that the plan sponsor of a PEP is the PPP. (As discussed in this letter, by statute, this treatment of the PPP as the plan sponsor applies only for administrative purposes.)

A parallel provision to Code Section 413(e)(3)(D) is also included in ERISA Section 3(43)(D) (i.e., within ERISA's definition of a PEP).

B. The language in Section 413(e)(3)(D) can only be interpreted in one way: to treat employers participating in a PEP as separate employers for all substantive purposes.

1. Analysis under the Code

Prior to the enactment of the SECURE Act, the Code and ERISA had elaborate and precise rules for determining for which purposes employers participating in a MEP were treated as separate employers and for which purposes employers were aggregated and treated as a single employer. For example, for coverage, nondiscrimination and top-heavy testing, the employers were treated as separate employers, but for vesting and eligibility service crediting, the employers were treated as a single employer. Congress, of course, was well aware of this. So, if Congress had wanted those rules to apply to PEPs, it is natural that Section 413(e) would have let the existing Section 413(c) rules apply by being silent on the question of the purposes for which each employer is treated separately.

However, on the contrary, Congress explicitly chose to create a new regime for PEPs by including, among other things, Section 413(e)(3)(D). Section 413(e)(3)(D) provides that each employer in a PEP shall, except for certain administrative duties assigned to the PPP, be treated as the plan sponsor with respect to the portion of the PEP attributable to the employees or beneficiaries of each such employer. Thus, Congress clearly established a new system under which each employer participating in a PEP is treated as a separate employer, except for purposes of the administrative duties assigned to the PPP under Section 413(e)(3)(A)(i). In this way, Section 413(e)(3)(D) overrides those otherwise applicable pre-existing MEP rules in Section 413(c) that would be applied with respect to the entire plan, including the rules related to service crediting. Such service crediting rules are clearly substantive rules, not administrative rules, since they establish substantive requirements, rather than just governing how a PEP is to be administered.

That is clearly the most natural reading of the statutory language. Moreover, those who would argue for a different conclusion are faced with the nearly impossible task of assigning a different meaning to Section 413(e)(3)(D). Nearly every Code reference to a retirement plan's "plan sponsor" applies in the defined benefit plan context, which makes such references irrelevant to PEPs because the Code and ERISA limit PEPs to individual account plans.[3] The remaining uses of the term "plan sponsor" in the Code similarly lack any implications for PEPs that could conceivably explain the inclusion of Section 413(e)(3)(D). Thus, on its face, there is no apparent meaning to or reason for such Section other than the natural reading described above.

The legislative history supports our analysis by simply restating the statutory language, which, as noted, is read naturally in the way we suggest. A House Ways and Means Committee report on the PPP provision, as included in the Family Savings Act of 2018 (FSA), states the following with respect to Section 413(e)(3)(D):

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[3] Code Section 413(e)(1); ERISA § 3(43)(A)(i).

> The provision also provides that, except with respect to the administrative duties (as a named fiduciary, as the plan administrator, and as the person responsible for the performance of all administrative duties) for which the pooled plan provider is responsible as described above, each employer in a plan which has a pooled plan provider will be treated as the plan sponsor with respect to the portion of the plan attributable to that employer's employees (or beneficiaries of such employees).[4]

If there were some clear other way to interpret this language, it would have been natural for the legislative history to specify that interpretation. Instead, we are left with language that can only be interpreted in one way.

It has been suggested that one potential explanation of Section 413(e)(3)(D) is that Congress intended to ensure that each participating employer in a PEP has access to the IRS' Employee Plans Compliance Resolution System (EPCRS) as a "plan sponsor." But to ascribe such a narrow and obscure intent to broad language would be counter to basic principles of statutory construction. Moreover, without a more explicit direction from Congress, nothing in Section 413(e)(3)(D) obligates the IRS to make EPCRS separately available to every participating employer with respect to a PEP. Similar to EPCRS's treatment of MEPs today,[5] the IRS could specify situations in which only a PPP may submit a Voluntary Correction Program filing with respect to a PEP and Section 413(e)(3)(D) does nothing to prevent that result.

It has also been suggested that the service crediting rules of Section 413(c)(1) and (3) must apply because Section 413(e) only applies to plans to which 413(c) applies. This argument fails for two reasons. First, Section 413(c) clearly applies to all plans maintained by more than one employer (other than plans described in Section 413(b)) and our interpretation is not inconsistent with that in any way. Second, Congress clearly has the ability to limit Section 413(e) to plans to which Section 413(c) applies and to then exempt PEPs from some of the Section 413(c) rules, which is exactly what Congress did with Section 413(e)(3)(D).

Another argument against our interpretation is that if each plan sponsor is treated separately for purposes of the qualification requirements, then there would have been no need for relief from the one bad apple rule. That argument fails because the statutory provisions are very clear that Section 413(e)(3)(D) does not apply for the administrative purposes described in Section 413(e)(3)(A)(i). The latter includes all administrative

[4] H.R. Rep. No. 115-195 at 31.

[5] Rev. Proc. 2019-19 § 10.11.

duties necessary to keep the plan qualified, which would clearly include addressing the qualification problems created by a noncompliant employer.

Finally, it goes without saying that Reg. §1.413-2(a)(1) does not affect our analysis. That regulation provides the service crediting rules in Section 413(c) apply "notwithstanding any other provision of the code (not specifically in conflict with the special rules hereinafter mentioned)". Section 413(e)(3)(D) is, as noted, specifically in conflict with the service crediting rules, thus overriding them.

Other potential explanations of Section 413(e)(3)(D) similarly make little sense, particularly when considered alongside pre-existing MEPs. For example, one might point to Section 413(e)(3)(D) as the basis for allowing participating employers in a PEP to choose the plan design options that will apply to each employer's portion of the plan. But that is the law for pre-existing MEPs and would be the law for PEPs with or without Section 413(e)(3)(D). Anyone arguing for a contrary interpretation of Section 413(e)(3)(D) faces the nearly impossible task of finding a different purpose for language naturally read in the way we are suggesting.

2. Analysis under ERISA

An analysis of the parallel language in Section 3(43)(D) of ERISA similarly fails to provide any obvious meaning to the text for purposes of ERISA, let alone with respect to the Code, other than the meaning we ascribe to it.

ERISA Sections 3(16)(B) and 3(43)(D) together provide that the plan sponsor of a PEP is the PPP, except that for generally non-administrative purposes, each participating employer is the plan sponsor with respect to a portion of the plan. As with Code Section 413(e)(3)(D), the House Ways and Means Committee report on the FSA once again generally restates the statutory text in ERISA Section 3(43)(D).[6]

ERISA's text includes the term "plan sponsor" in a handful of provisions, but none of those occurrences provide an alternative explanation for Congress's addition of ERISA Section 3(43)(D) or the parallel language in Code Section 413(e)(3)(D), especially in light of the fact that the statute is clear that the employers are not treated as plan sponsors for administrative purposes.[7]

In considering the Council's interpretation from an ERISA standpoint, we note that Section 210(a) of ERISA includes a number of rules for MEPs that generally parallel the rules in Code Section 413(c), including with respect to service crediting. Section 210(a) of ERISA states that those rules apply "[n]otwithstanding any other provision of [part 2]

[6] H.R. Rep. No. 115-195 at 33.

[7] ERISA §§ 3(16), 101(i)(3), 103(a)(2), 104(b)(1), 104(b)(5), 105(a)(2)(D)(iv), 204(h)(6), 404, 408and 514(e).

or part 3 [of subtitle B].” Notably, the language that overrides these rules is located in Section 3(43)(D) of ERISA, which is located in subtitle A. Thus, the “notwithstanding” language in Section 210(a) of ERISA also does not affect our interpretation.

Thus, for all of the above reasons, the only interpretation of Code Section 413(e)(3)(D) and ERISA Section 3(43)(D) that gives meaning to the provisions is the natural interpretation we suggest.

Also, as discussed in Part II below, the Council’s interpretation is supported by policy reasons that explain why Congress would add Section 413(e)(3)(D) to override certain rules in Section 413(c) with respect to PEPs but not pre-existing MEPs.

II. The Above Technical Analysis is Supported by the Policy Reasons that Drove the Creation of PEPs.

As discussed above, we believe that a technical analysis of the language in Section 413(e)(3)(D) supports the explanation that the language serves to override for PEPs certain otherwise applicable rules for MEPs in Section 413(c), including the service crediting rules. As discussed below, there are a number of policy reasons that support this interpretation.

A. The Council’s proposed interpretation is consistent with the policy goal of expanding individual account plan coverage.

Congress was clear that its goal in creating PEPs was to expand the use of MEPs, particularly among small businesses,[8] thus contributing to the more general goal of making it easier for employers to offer retirement plans to their employees.[9] PEPs and the concept of “open” MEPs have been described as furthering these goals in part by “reducing costs”[10] and providing “administrative simplicity.”[11]

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[8] *See, e.g.*, Report of Comm. On Ways & Means House of Rep. on H.R. 1994 (May 16, 2019) at 31, 38 (stating that the Committee “wishes to remove possible barriers to broader use of multiple employer plans” and that the SECURE Act modifies the requirements of MEPs to “make it easier for small businesses to offer such plans”).

[9] *Id*. at 30.

[10] Letter from Richard E. Neal, Chairman, Comm. On Ways & Means, to Eugene Scalia, Secretary, Dept. of Labor (June 24, 2020).

[11] Statement of Sen. Michael B. Enzi, Hearing Before the Senate Comm. On Finance: Helping Americans Prepare for Retirement: Increasing Access, Participationand Coverage In Retirement Savings Plans (Jan. 28, 2016).

Although allowing completely unrelated employers to join in the same plan makes PEPs more *accessible* to employers, without more, that change alone does not necessarily make them more *attractive*. In fact, unless the service crediting rules are interpreted in the way we suggest, PEPs could actually be less attractive to some employers.

- If small employers know that, for example, they may need to treat new hires as immediately eligible and immediately vested that could mean fewer small employers join PEPs, undermining the extent of the coverage expansion. This is because the potential additional expenses of applying the service crediting rules across the entire PEP could erase the cost savings obtained elsewhere for the PEP through economies of scale. Tracking service crediting based on an employee's previous employers does little to advance administrative simplicity and cost savings.
- Similarly, many employers would likely be dismayed to learn that, under a PEP, a short-term employee who left after a couple of years could become 100% vested later by reason of working for an unrelated employer. Again, this has cost implications.
- Employers may also be concerned that a PEP may create tensions among employees in situations where, for example, two newly hired employees may be treated very differently in terms of plan participation and vesting – with one employer being treated as newly eligible with no prior service and an otherwise similarly situated new hire being eligible to participate immediately and to be fully vested.
- Furthermore, a requirement for PEPs to apply the service crediting rules across the entire plan effectively overrides elements of the specific plan design that a participating employer may have selected. For example, an employer that elected one vesting schedule for its employees may be forced to apply that schedule inconsistently among its employees if service with a previous employer must in some cases be credited.

There is a trade-off between policies aimed at broadening plan coverage and the employee-friendly service crediting rule for pre-existing MEPs under Section 413(c) which was originally intended to cover movement within the same industry. But we believe that Congress' repeated emphasis on the desire to expand plan coverage across multiple employers and industries by reducing costs and administrative burdens supports a conclusion that Section 413(e)(3)(D) provides an override of those rules for PEPs where such rules would make participation in a PEP much less attractive and would not serve to further Congress's policy goals.

2. The Council's proposed interpretation reflects and accommodates key differences between PEPs and pre-existing MEPs.

The key difference between PEPs and pre-existing MEPs is whether the participating employers have "a common interest other than having adopted the plan."[12] Employers participating in a pre-existing MEP are required to have a common bond, which makes the service crediting rule in Section 413(c) (and other rules that are applied across the entire plan) appropriate in that context. In a PEP, however, such rules are less appropriate because the employers may not have any relationship besides shared participation in the PEP.

For example, why should a hardware store in Maine have to make a new employee immediately eligible and immediately vested based on prior service by the same employee for a barber shop in Oregon, just because the two employers participate in the same PEP? From an employee equity standpoint, if two employees begin work at the Maine hardware store on the same day and one of the employees previously worked for the Oregon barber shop, how does the Maine employer explain to its new hires that one is already eligible to participate in the plan and is fully vested but the other is not? As a related issue, if an employee leaves one employer without enough service to vest, why should that employer be precluded from forfeiting that employee's benefit just because the employee moves to another employer in the PEP where there is no requisite common bond providing support for that outcome? Such a result would actually increase the costs of the first employer where such employer may have intended to utilize the forfeitures attributable to the former employee in an effort to reduce the first employer's future costs (which it could have done prior to joining the PEP).

Employers that share a common bond in a pre-existing MEP may in many cases have reasons to support rules such as the service crediting rules in Section 413(c) because there is a desire to accommodate movements in the workforce, such as when the participating employers operate in a common industry. Also, by retaining such rules for pre-existing MEPs, including those administered by professional employer organizations (PEOs), Congress avoided causing significant disruption to the method in which such plans are currently administered and to participants' expectations.

The question has been raised as to whether pre-existing MEPs would intentionally seek to become PEPs if our suggested service crediting rule were adopted. We have two thoughts on that point. First, in the event that stakeholders in a pre-existing MEP determine that converting the MEP to a PEP would be more beneficial, the plan should have the option to do so by adding a PPP and expanding to employers that do not share a common bond. That is their right under the Section 413(e)(1) and ERISA Section 3(43)(A) of the statutes. Second, many pre-existing MEPs may choose not to do so. There are burdens and costs applicable to PEPs. A pre-existing MEP, if it wanted to convert to a PEP, seemingly would have to allow some unrelated employers (not just those with the same common interest) to join the MEP. Doing so would impose certain

[12] Code § 413(e)(1)(A).

administrative burdens on the sponsor. That, along with the very detailed PPP registration requirements recently proposed by the U.S. Department of Labor and the various disclosure and reporting obligations authorized under the SECURE Act would impose burdens that may discourage at least some common interest MEPs from simply converting to a PEP. It is not at all clear that a pre-existing MEP would be well served by a change to a PEP.

In addition, for PEOs, the question of abandoning the treatment of employees as all employed by one employer for purposes of the service crediting rules may have repercussions outside of the retirement space, leading to material questions regarding whether a PEP model is the best model for them. Thus, for example, for PEOs which currently may pay all their workers through the PEO's payroll system, if an unrelated employer were added to make a PEO-sponsored MEP a PEP, the PEO may then need to accept payroll feeds and census data from the unrelated employer – which may prove to be disruptive to the PEO's business model.

These key differences between pre-existing MEPs and PEPs provide further support for the Council's interpretation of Section 413(e)(3)(D). As discussed in Part I, other possible interpretations of Section 413(e)(3)(D) are not reasonable to the extent that they fail to explain why Section 413(e)(3)(D) applies only to PEPs and not pre-existing MEPs. Under the Council's proposed interpretation, however, it is perfectly explainable and rational as to why Section 413(e)(3)(D) would override certain rules in Section 413(c) for PEPs but not pre-existing MEPs, in light of the differences noted above.

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Thank you for your consideration of our comments. If you would find it helpful to discuss any of these matters with us, please contact me at 202-289-6700 or ldudley@abcstaff.org.

Sincerely,

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