



# AMERICAN BENEFITS COUNCIL

February 27, 2020

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Dear Carol, Vicki, and Cathy:

We look forward to the opportunity to meet with you to discuss guidance priorities with respect to ensuring that pooled employer plans (PEPs) (as defined in the SECURE Act) can be established effectively for the 2021 plan year when the PEP rules become effective. In the meantime, we thought that it might be helpful to provide our input in writing.

Under Section 101 of the SECURE Act, there are several substantive areas that require similar guidance from both the IRS/Treasury and the Department of Labor (DOL) and will require significant coordination. With this in mind, we have the following key points regarding PEP guidance priorities.

- **Consolidated Form 5500:** As you know, SECURE provided two ways for small employers to pool their resources and achieve lower costs through economies of scale: (i) PEPs; and (ii) the ability to file a single consolidated Form 5500 for a group of structurally identical single employer plans (under Section 202 of SECURE). Both approaches have great value and could be widely used. Accordingly, in our view, it is a very high priority for the new consolidated Form

5500 to be finished in time so that it can be used for the 2022 plan year, consistent with the effective date under SECURE. We recognize that modifying the Form 5500 takes time and will require significant coordination with the DOL, and we stand ready to assist in your efforts to complete this work.

- **Clarification of audit issue:** One key point is in need of clarification in the consolidated Form 5500 guidance. Within the group of single employer plans subject to the consolidated Form 5500, there may be plans with under 100 participants and plans with 100 or more participants. Clearly, there is no requirement to perform an audit with respect to the plans with under 100 participants. But it would be helpful for the guidance to provide that the plans with 100 or more participants may be audited in the aggregate, as an alternative to auditing them individually. In other words, there would be one Form 5500, with no audit required with respect to the small employers and one aggregated audit permitted with respect to all the larger employers.
- **PEPs: expanding coverage:** We believe that certain guidance on PEPs is needed, such as guidance on registration of pooled plan providers (PPPs) and on mandatory Form 5500 changes for PEPs (separate from the consolidated Form 5500 discussed above). But Treasury and the IRS were also given discretionary authority to impose a number of additional reporting and disclosure rules with respect to PEPs. We urge Treasury and the IRS not to exercise that discretionary authority initially, and to affirmatively state this, as described below.
  - **Administrative cost issues:** The point of PEPs is to reduce administrative costs and thereby broaden coverage for small employers. If a number of new burdens are imposed on PEPs that do not apply to existing plan models used with small businesses, the cost savings of PEPs could be partially or fully eliminated, thereby defeating the purpose of the legislation and rendering PEPs partially or fully ineffective. We ask you to consider delaying any new burdens until the PEP market develops, in order to determine if any new burdens are needed or justified.
  - **Affirmative statement on the above approach:** It would be very helpful for Treasury and the IRS to say officially that they will not be exercising their discretionary authority to impose new requirements on PEPs. The reason is that organizations are working now to determine whether to sponsor PEPs and, if so, how. If there is a strong possibility of new regulatory requirements that would undercut the cost savings of PEPs, some organizations may choose not to sponsor a PEP due to the uncertainty. Others might delay implementation of PEPs for fear that they would need to revise their system later, which will prove to be expensive.

- **Registration process:** We do not see either a statutory basis or policy need for an elaborate PPP registration process. Consistent with the objective of keeping administrative costs low, we would suggest simply requiring a single submission to the DOL and/or the IRS with the name, address, phone number, and EIN of the PPP. We look forward to guidance on registration well before the end of the year. If the full guidance is not ready, we would ask for guidance clarifying that a good faith compliance standard applies to the registration process.
- **One bad apple rule:** As noted in our comment letter dated September 30, 2019, we believe that the proposed rules issued by Treasury and the IRS were an excellent first step toward mitigating the one bad apple rule, and our letter identified a few areas where modifications would be helpful, including extending the proposal to 403(b) MEPs and eliminating the requirement that the plan not be under examination. In our view, the structure reflected in the proposed rules is entirely consistent with the one bad apple provision in the SECURE Act, which leaves the implementation details to Treasury and the IRS. So, as discussed in detail in the footnote below, we believe that the proposed rules need only be tweaked to address comments and to conform to the SECURE Act, such as the new rules regarding pooled plan providers.<sup>1</sup> As a matter of process, a re-proposal may be needed because of the change in the law, but we

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<sup>1</sup> The provisions in the proposed regulations are very consistent with the SECURE Act provisions.

- **Spinoff requirement in the proposed rules:** This is consistent with new Section 413(e)(2)(A).
- **Termination requirement in the proposed rules:** This is consistent with new Section 413(e)(4)(A)(ii).
- **Policies and procedures requirement:** Under the proposal, the MEP administrator must have established practices and procedures reasonably designed to promote and facilitate compliance with the Code. This is consistent with new Section 413(e)(2)(B).
- **Plan terms requirement:** Under the proposal, the plan terms must address the procedures to be taken in the case of a “participating employer failure.” This is consistent with new Section 413(e)(2)(A).
- **Application to potential qualification failures, as well as known failures:** This is consistent with the flush language at the end of new Section 413(e)(4), which references employer failures 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 a plan”. This is clearly a reference to the lack of employer cooperation that can result in the type of potential qualification failure described in the proposal.
- **Solely attributable to an employer:** Under the proposal, a failure has to be solely attributable to an employer to be eligible for the relief. This is consistent with new Section 413(e)(2)(B).
- **Notice requirements:** The proposal requires a series of notices to be provided to the noncompliant employer to ensure that the employer has an opportunity to cure the failure prior to any spinoff. This is consistent with: (1) new Section 413(e)(4)(A)(iii) (which authorizes the Secretary to determine when spinoffs are appropriate), and (2) the immediately succeeding flush language which, for purposes of determining if a spinoff is appropriate, authorizes the Secretary to take into account whether an employer’s failure “has continued over a period of time that demonstrates a lack of commitment to compliance.”

would suggest a short comment period, followed by an expedited finalization process.

- **Model plan:** As discussed in our comment letter and required under the SECURE Act, it would be very helpful for Treasury and the IRS to publish model plan language to qualify for the one bad apple relief and to qualify for pooled employer plan status.

Our members may, of course, have different priorities among the above issues, but we wanted to flag all of the key issues that have been raised to us. If you have any questions regarding this letter, please contact me at 202-289-6700 or at [jjacobson@abcstaff.org](mailto:jjacobson@abcstaff.org).

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Jacobson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Jan Jacobson  
Senior Counsel, Retirement Policy

cc: Jamie Dvoretzky  
William Evans  
Lauson Green  
Pamela Kinard  
Linda Marshall  
Stephen Tackney  
Harlan Weller