The SPARK Institute, Inc.
SHAPING AMERICA'S RETIREMENT

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October 1, 2019

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

Re: Proposed Regulations on Multiple Employer Plan Relief (REG-121508-18)

Dear Sir or Madam:

The SPARK Institute, Inc. appreciates the opportunity to comment on the proposed exception to the unified plan rule published by the Department of the Treasury ("Treasury") and Internal Revenue Service ("IRS") in the Federal Register on July 3, 2019.

The SPARK Institute represents the interests of a broad-based cross section of retirement plan service providers and investment managers, including banks, mutual fund companies, insurance companies, third-party administrators, trade clearing firms, and benefits consultants. Collectively, our members serve approximately 95 million employer-sponsored plan participants.

The SPARK Institute supports all efforts to promote retirement savings and increase the number of employees who have access to a workplace retirement plan, including efforts to expand the availability of multiple employer plans ("MEPs"). As noted in the preamble to the proposed regulations, MEPs are an attractive retirement savings option for employers, especially small employers, because they create efficiencies and reduce administrative costs. Notwithstanding these well-known benefits, however, the unified plan rule currently makes employers reluctant to join a MEP and creates uncertainty for plan administrators when participating employers are unresponsive to requests for information and other directions. The SPARK Institute commends Treasury and IRS for proposing regulations that will address both of those existing barriers to greater MEP participation. We are pleased to support this proposal.

As explained in greater detail below, SPARK also believes that Treasury and IRS can improve the proposed exception to the unified plan rule by streamlining its conditions, broadening its availability, and providing additional clarity.

I. Streamline and Expedite Notice Requirements

As a condition for relief, the proposed regulations would require MEP administrators to provide a series of notices to participating employers that have known or potential qualification failures, with 90-day waiting periods in between each round of notices. The SPARK Institute generally supports these notices as an appropriate condition for ensuring that engaged employers have an opportunity to respond to information requests and other directions from MEP administrators. However, we also believe that the proposed notice requirements are overly burdensome and will unnecessarily delay MEP administrators in their efforts to spin off assets attributable to unresponsive employers. In total, the notice requirements preceding a spinoff will take at least nine months to complete. Accordingly, SPARK recommends that Treasury and IRS streamline and expedite these proposed notice requirements – e.g., by limiting the number of notices and/or reducing the length of the waiting periods between notices. This is especially appropriate when considering that, even before the first notice can be sent to an unresponsive employer, MEP administrators will likely have taken multiple steps to contact unresponsive employers. Also, a shorter system of notices will make it more likely that benefits will be paid to MEP participants before they become lost or missing.

II. Streamline the Two-Step Spinoff / Termination Process

The proposed exception to the unified plan rule would require MEP administrators to spin off assets attributable to the employees of unresponsive participating employers to a separate single-employer plan, followed by a termination and distribution of the assets of such plan. The SPARK Institute commends Treasury and IRS for proposing a solution that will allow the assets attributable to unresponsive employers to be segregated from the pooled arrangement and distributed to affected employees as an eligible rollover distribution. However, we are also concerned that the proposed process could introduce unnecessary complexity and administrative burdens if finalized as proposed. For example, any single-employer plan established to complete a spinoff and termination will require its own written plan documents and Form 5500 filing, among other documentation.

To eliminate unnecessary administrative burdens and cost, we recommend that Treasury and IRS develop a streamlined termination process that would allow the assets attributable to unresponsive employers to be distributed to affected employees in a single step that does not require the creation of a separate single-employer plan that will only exist temporarily. If necessary, Treasury and IRS should use their regulatory authority to treat the portion of an existing MEP that is attributable to an unresponsive employer, solely for purpose of the spinoff and termination, as if it were its own single-employer plan that has the same administrator, trustee, and terms as the broader MEP, except that its participants are limited to the employees of the unresponsive employer. In the alternative, regulators should clarify the extent to which any generally required notices, disclosures, or other documents, if any, are unnecessary or inappropriate in connection with a spinoff, followed by an immediate termination.

III. Eliminate Unnecessary Eligibility Restrictions

In order to qualify for the proposed exception to the unified plan rule, a MEP cannot be "under examination." For purposes of this rule, a plan is "under examination" if: (1) the plan is under an Employee Plans examination; (2) the plan is under investigation by the Criminal Investigation Division of the IRS; or (3) the plan is "treated as under examination" pursuant to special rules. Under those special rules, a determination letter applicant would be "treated as under examination" if the applicant is notified of possible qualification failures, including a case in which 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 this definition is similar to the definition of "under examination" for purposes of the Employee Plans Compliance Resolution System ("EPCRS").

The SPARK Institute recognizes that EPCRS limits eligibility for its voluntary correction procedures – whether the Self-Correction Program ("SCP") or Voluntary Correction Program ("VCP") – depending on whether a plan is "under examination." In the context of EPCRS, this eligibility restriction is appropriate because it encourages plan sponsors to voluntarily bring their own qualification failures to the attention of the IRS before an examination. This eligibility condition, however, may be unnecessary in the context of the IRS's proposed exception to the unified plan rule, especially in light of the fact that the relief is not available for failures that are attributable to the MEP administrator or for plan-wide operational or plan document issues.

Accordingly, the SPARK Institute recommends that Treasury and IRS remove this eligibility condition for relief from the unified plan rule. Alternatively, the final rules could provide that a plan is under examination for this purpose only if the portion of the plan that relates to the unresponsive employer is specifically identified by an IRS auditor in writing as under examination. One further alternative is to include in the Internal Revenue Manual an instruction to reviewers that, if the conditions of the regulation are satisfied, the reviewer should allow a plan administrator to move forward with the regulations' procedures while the examination and any resulting corrections are ongoing.

IV. Extend Similar Relief to Multiple Employer 403(b) Plans

By its terms, the proposed exception to the unified plan rule is limited to MEPs that are organized pursuant to Code sections 401(a) and 403(a) – i.e., qualified plans.[1] Those qualified plans, however, are not the only types of multiple employer arrangements that exist in today's marketplace. Public schools and non-profit employers currently participate in multiple employer 403(b) plans that create the same economies of scale and administrative efficiencies that are experienced by their for-profit peers when pooling together through 401(k) MEPs.

There is a lack of clarity on how 403(b) MEP administrators should handle known and potential failures when participating employers fail to respond to their requests. Accordingly, Treasury and IRS should publish relief for multiple employer 403(b) plans that parallels the proposed relief for pooled 401(a) and 403(a) plans. This could be done via a parallel amendment to the regulations under section 403(b), a revenue procedure or revenue ruling, or an update to EPCRS. As under the proposed regulations, such relief should not only address known failures,

[1] Code section 413(c) is not, by its terms, restricted to qualified 401(a) and 403(a) plans, although the language does reference the application of the exclusive benefit rule in section 401(a), and the current regulations refer to 401(a) and 403(a) plans. Accordingly, it has generally been understood that section 413(c), and the regulations thereunder, are not applicable to 403(b) plans.

but should also include a mechanism for segregating the assets of employees that are attributable to employers that fail to respond to requests from MEP administrators.

V. Known and Potential Qualification Failures

The proposed exception to the unified plan rule is available for known and potential qualification failures. The proposed regulations define a "known qualification failure" to mean "a failure to satisfy a qualification requirement with respect to a section 413(c) plan that is identified by the section 413(c) plan administrator and is *attributable solely to an unresponsive participating employer*." Similarly, a "potential qualification failure" is defined as a "failure to satisfy a qualification requirement with respect to a section 413(c) plan that the section 413(c) plan administrator reasonably believes might exist, but the section 413(c) plan administrator is unable to determine whether the qualification requirement is satisfied *solely due to an unresponsive participating employer's failure to provide data, documents, or any other information* necessary to determine whether the section 413(c) plan is in compliance with the qualification requirement as it relates to the participating employer."

Employers that participate in a MEP work with a wide variety of service providers and consultants. In the real world, the actions by multiple parties – including participating employers and service providers – can contribute to a qualification failure, even if a single participating employer was the only party that could reasonably be viewed as causing the failure. Treasury and IRS should provide additional clarity on what it means for a failure to be "solely" attributable to or due to an unresponsive employer. For example, it would be useful to clarify that a qualification failure is "attributable solely to an unresponsive participating employer" if such failure does not relate to the contributions or benefits attributable to participants of another participating employer. Any clarification should allow the proposed exception to be used as broadly as possible to the benefit of employers that take all necessary actions to maintain the plan's qualification.

VI. Participants with a Single Account Attributable to Multiple Employers

Sometimes, an employee may have participated in a MEP as a result of employment with different employers that participate in the MEP. This is not surprising given that many MEPs cover employers in the same industry. The preamble to the proposed regulations requests comments on, in the context of a spinoff, how to treat participants who have a single account with assets attributable to service with the unresponsive participating employer and one or more other participating employers, or who have a separate rollover account that is not attributable to service with the unresponsive participating employer. We recommend that the spinoff and termination apply to accounts that are designated as attributable to the unresponsive employer in the records of the plan, even if some or all of the assets may have originated with another employer. Also, we recommend that Treasury and IRS make clear that such a spinoff does not affect the portion of the plan attributable to any previous employers that are associated with the accounts that are being spun off.

VII. Request for Clarification on Fiduciary Liability

The preamble to the proposed regulations requests comments on the steps that the Secretary of Labor should take to facilitate the implementation of the proposed regulations. In response to this request, the SPARK Institute urges the Secretary of Labor to address the following concerns:

- *MEP Administrators' Responsibility for Spun-off Plans.* The Department of Labor ("DOL") should provide guidance clarifying that a MEP administrator does not violate its fiduciary duties by allowing a previously unresponsive employer to spin off its assets, even though the administrator would know that such employer has previously made mistakes.

- *Unpaid Contributions.* DOL should provide guidance that protects MEP administrators from liability when the assets of a participating employer are spun off and the participating employer has failed to make salary deferral contributions that are otherwise due to the plan, so long as the plan administrator has taken responsible steps prior to the spinoff to contact the employer.

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The SPARK Institute appreciates the opportunity to provide comments on the proposed exception to the unified plan rule. If you have any questions or would like more information regarding this letter, please contact me or the SPARK Institute's outside counsel, Michael Hadley, Davis & Harman LLP (mlhadley@davis-harman.com or 202-347-2230).

Sincerely,

Tim Rouse
Executive Director