The SPARK Institute, Inc.
SHAPING AMERICA'S RETIREMENT

May 27, 2022

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CC:PA:LPD:PR (REG-121508-18)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

RE: Proposed Relief from Unified Plan Rule

Dear Sir or Madam:

On behalf of the SPARK Institute, Inc., we are writing in response to the Treasury Department and Internal Revenue Service ("IRS") proposal implementing the unified plan rule relief that was included as part of the Setting Every Community Up for Retirement Enhancement ("SECURE") Act of 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 100 million employer-sponsored plan participants.

As the SPARK Institute emphasized in our comments responding to the 2019 Treasury and IRS proposal to provide relief from the unified plan rule, 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"). The harsh consequences that can result from the application of the longstanding regulatory interpretation of the unified plan rule have been an impediment to the adoption of MEPs. Accordingly, the SPARK Institute would like to take this opportunity to reiterate its support for the SECURE Act's statutory relief from the unified plan rule, in addition to expressing our general support for the current Treasury and IRS proposal implementing that relief.

Although we generally support the proposal, we do offer a few recommendations for further improvements below. First, we recommend that the final regulations provide that, as an alternative to satisfying the conditions described in the proposal, a MEP will qualify for the SECURE Act's relief from the unified plan rule if, pursuant to the terms of the plan document and following the proposed notice procedures, *the MEP administrator* initiates a spinoff of the assets attributable to the employees of unresponsive employers to a separate single-employer plan, followed by a termination and distribution of the assets of such plan. This approach would be consistent with the unified plan rule relief proposed by Treasury and IRS in 2019. Second, we recommend that the final regulations allow a MEP administrator to place mandatory cash-out amounts of $1,000 or less in an IRA (if the participant does not elect otherwise). Third, we reiterate our prior suggestion that Treasury and IRS consider parallel relief for 403(b) plans that are MEPs. Finally, we suggest coordination with the Department of Labor ("DOL") on any fiduciary issues that may be raised by a MEP administrator following the procedures laid out in the proposal.

I. Conditions for Unified Plan Rule Relief

The current proposal would generally condition its relief from the unified plan rule upon: (1) a MEP administrator sending multiple notices to employers who fail to take an action that is necessary for maintaining the plan's compliance with the Internal Revenue Code ("Code"); and (2) in the event that the employer does not take the necessary action, the MEP administrator providing each participant who is attributable to the unresponsive employer with an election to directly roll over to an eligible retirement plan or remain in the MEP. The SPARK Institute supports these proposed conditions for relief and commends Treasury and IRS for developing conditions that would allow affected participants to remain in a MEP, notwithstanding any failures caused by their employers.

The SPARK Institute also believes, however, that the proposal would be improved by providing that, as an alternative to offering the participant election feature discussed above, a MEP would also be eligible for the SECURE Act's relief from the unified plan rule if, pursuant to the terms of the plan document and following the proposed notice procedures, the MEP administrator initiates a spinoff of the assets attributable to an unresponsive employer to a separate single-employer plan, followed by a termination and distribution of the assets of such plan. This approach would be consistent with the unified plan rule relief proposed by Treasury and IRS in 2019. Given the lack of clear guidance on a MEP administrator's obligations with respect to employees of unresponsive employers, we believe that this alternative approach would give MEP administrators additional flexibility to handle the issues caused by unresponsive employers and further facilitate the creation of MEPs.

II. Improvements from 2019 Proposal

The SPARK Institute appreciates the various ways in which the current proposal incorporates improvements that the SPARK Institute requested in response to the unified plan rule relief proposed by Treasury and IRS in 2019. These improvements include, for example:

- The proposed elimination of the requirement that would have made a MEP ineligible for unified plan rule relief if it is under examination before the MEP administrator sends the first notice to an unresponsive employer;
- The proposed shortening of the period that MEP administrators must wait in between different rounds of employer notices from 90 to 60 days;

- The proposed elimination of one round of employer notices in the event that a failure to provide information becomes a failure to take action; and
- The proposed clarification on how the relief from the unified plan rule applies when a participant's account within a MEP is attributable to the participant's employment with two or more different employers.

III. MANDATORY CASH-OUTS OF $1,000 OR LESS

The current proposal includes a series of rules describing how the new participant election feature may or must operate in certain contexts. This set of rules includes two provisions indicating that small account balances of $1,000 or less that must be distributed from a plan pursuant to a mandatory cash-out provision may not be distributed to an automatic rollover IRA chosen by the participating employer and/or MEP administrator.[1] Instead, with respect to these mandatory distributions of $1,000 or less, the proposal indicates that they must be paid to the employee-participant.

The SPARK Institute requests that Treasury and IRS amend the proposal to provide that these small accounts *may* also be sent to an IRA chosen by the participating employer and/or MEP administrator. Although the Code does not require these amounts to be distributed to an automatic rollover IRA, they are generally eligible rollover distributions that may otherwise be rolled over to an IRA. To the extent that participating employers and/or MEP administrators choose to send all mandatory cash-outs to an automatic rollover IRA, rather than having separate procedures depending on whether a cash-out is more or less than $1,000, the relief from the unified plan rule should not operate as a barrier to this approach that is otherwise permitted by the Code and IRS guidance.

This approach would be consistent with how many plans work today. While the automatic IRA rollover rules in Code section 401(a)(31)(B) do not require an IRA rollover for amounts of $1,000 or less, many plans have decided to apply the automatic IRA rollover rules to all cash-outs, and many IRA custodians that offer automatic IRA rollover services will accept these amounts. The DOL fiduciary safe harbor does apply to distributions of $1,000 or less.[2]

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[1] *See* Prop. Treas. Reg. section 1.413-3(e)(4)(iii)("For the portion of the mandatory distribution that is an eligible rollover distribution subject to section 401(a)(31)(A) (but not section 401(a)(31)(B)), the section 413(e) plan administrator must provide the individual with an election in accordance with section 401(a)(31)(A) for that portion to be—(A) Rolled over directly to an eligible retirement plan *chosen by the individual*; or (B) If no eligible retirement plan is chosen pursuant to paragraph (e)(4)(iii)(A) of this section, paid directly to the individual" (emphasis added)); Prop. Treas. Reg. section 1.413-3(e)(4)(iv)("For any portion of a mandatory distribution that is not subject to the requirement to offer a direct rollover option under section 401(a)(31), the section 413(e) plan administrator *must pay the individual*. For example, a section 413(e) plan administrator is not required to provide an election to an individual with an account balance of less than $200 if, consistent with section 411(a)(11) and § 1.401(a)(31)-1, Q&A-11, plan terms require that mandatory distributions of less than $200 be paid directly to distributees" (emphasis added)).

[22] DOL Reg. § 2550.404a-2(d).

IV. ADDITIONAL RELIEF AND COORDINATION WITH DOL

The SPARK Institute is very encouraged by all of the recent legislative and regulatory activity to support the expansion of MEPs, including pooled employer plans ("PEPs"). We also strongly believe, however, that more can be done to facilitate these arrangements. In this regard, the SPARK Institute encourages Treasury and IRS to consider additional ways that they can use their authority to make it easier for employers to join a MEP.

For example, consistent with the comments we submitted in response to the 2019 proposal, which would not have provided analogous relief for 403(b) MEPs, the SPARK Institute is reiterating its request for Treasury and IRS to publish relief for multiple employer 403(b) plans that parallels the proposed relief that would be available to MEPs that are organized as 401(a) plans and plans that consist of individual retirement accounts. 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 the Employee Plans Compliance Resolution System ("EPCRS"). As under the proposed regulations, such relief should not only address participating employer failures to act, but also participating employer failures to provide information to the plan administrator.

Additionally, we urge Treasury and IRS to coordinate with the DOL to seek public assurances from DOL that it would not view a MEP administrator completing the steps that are necessary to satisfy the proposed relief from the unified plan rule as violating any obligation imposed on the MEP administrator through Title I of the Employee Retirement Income Security Act ("ERISA"). For example, DOL should publicly state that it would not view a MEP administrator as violating any duties under ERISA merely by spinning off a portion of a MEP pursuant to employer direction under Proposed Treasury Regulation section 1.413-3(d)(2), even though the MEP administrator may know that the employer has previously made errors, possibly including failures to transmit contributions to the plan.

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The SPARK Institute appreciates the opportunity to provide these comments to Treasury and IRS. If you have any questions or would like more information regarding our comments, please contact me or the SPARK Institute's outside counsel, Michael Hadley, Davis & Harman LLP (mlhadley@davis-harman.com).

Sincerely,

Tim Rouse
Executive Director