



May 26, 2022

Via <http://www.regulations.gov>

Rachel Leiser Levy  
Associate Chief Counsel  
Employee Benefits, Exempt Organizations and Employment Taxes  
Internal Revenue Service  
Room 520  
P.O. Box 7604  
Ben Franklin Station  
Washington, DC 20044

Re: CC:PA:LPD:PR (REG-121508-18)  
RIN 1545-BO97

Dear Ms. Levy:

AARP, on behalf of our nearly 38 million members and all older Americans nationwide, appreciates the opportunity to submit comments in response to the Internal Revenue Service's ("IRS") proposed regulation for an exception, if certain requirements are met, to the application of the "unified plan rule" for Multiple Employer Plans ("MEP") in the event of a failure by one or more employers participating in the plan.<sup>1</sup>

AARP applauds the IRS for striving to issue rules that improve retirement savings coverage by ensuring that one participating employer failure does not cause disqualification of a MEP for all employers maintaining the plan. Neither the compliant employers nor the participants benefit from a plan's disqualification in this instance. However, we urge several additional protections for plan participants.

#### **A. Plan Language**

AARP supports the requirement of the proposed regulation that the MEP plan documents must describe the procedures to address a participating employer's failure to either provide information or to take a certain action. All parties involved in the MEP -- pooled plan provider ("PPP"), administrator, participating employers, the participants, and governmental agencies --

---

<sup>1</sup> AARP, with its nearly 38 million members in all 50 States, the District of Columbia, and the U.S. territories, is a nonpartisan, nonprofit, nationwide organization that helps empower people to choose how they live as they age, strengthens communities, and fights for the issues that matter most to families, such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse.

need to know the eligibility and participant rules for the MEP. AARP strongly supports the IRS publishing guidance setting forth model language for all aspects of this rule including plan language and notices.

## **B. Notices**

The proposed regulation needs to improve notices to participants, as the current proposal requires too many notices over too long a period of time for participating employers who have committed a failure. As numerous multiemployer plans can attest, failure of a participating employer to provide information is often the first step towards a failure to submit employee contributions, with the frequent result of a bankruptcy filing because the participating employer is undergoing financial troubles.

Under the current proposal, depending on the type of failure, the participating employer who committed a failure could not be expelled from the plan for almost three years. This lengthy period permits the unresponsive employer to use dilatory tactics, requires the administrator to chase the employer who committed the failure if it does not respond to a notice, and leaves the participants with few options to recover their contributions.

AARP suggests that the participating employer which fails to submit information or take a required action should receive only one notice. That notice should be sent to the participants and the Department of Labor (DOL) at the same time. Given that the SECURE Act's purpose is to improve Americans' retirement security, participants should not have to wait to receive notice of an unresponsive participating employer until a third and final notice. If participants received an earlier notice, they could elect to stop their contributions immediately. Moreover, they could pressure their employer to respond to the MEP notice and take appropriate action. While written notice is preferred, even electronic notice should be easy (and inexpensive) to provide to the participants. Otherwise, participants are left unprotected. The DOL should also receive notice at the same in order to enable it to take appropriate action if employee contributions are not remitted as required under 29 C.F.R. § 2510.3-102.

If the IRS continues to offer multiple notices to the participating employer which committed a failure, then, at a minimum, the time limits for sending the second and third notices should be reduced from 60 days to 30 days. The participants and the DOL should receive the first and second notices at the same time as the participating employer. The proposal should not treat a failure to provide information and a failure to act any differently. The potential negative outcomes for both the plan and the participants are too great to have such a lengthy period for a participating employer which committed a failure to have no consequence. By significantly shortening this time period, both the plan and the participants are better protected.

Finally, AARP submits that certain scenarios should warrant immediate notices to participating employees, such as the incarceration of the owner, the closure of the business, or the bankruptcy filing of the business. By providing these participant notices, the plan and the participants will be

better protected and the administrator can avoid a charade of initial notifications to plan sponsors, saving plan administrative costs.

**C. Actions by Section 413(e) Plan Administrator Relating to Remedial Action or Employer-Initiated Spinoff**

*1. Failure To Provide Information That Becomes a Failure To Take Action*

AARP supports the proposal's permission to merge certain notices for failure to provide information and failure to take action. However, the fact that a special, complicated provision is necessary demonstrates that the process would be greatly simplified if only one notice was required with a shortened timeframe.

*2. Implementing a Spinoff*

An employer unresponsive to notices is unlikely to also proactively spinoff into a separate plan. In order to protect the participants, if the administrator knows or should reasonably know that the unresponsive employer has not made required employee or employer contributions, then it would be appropriate for any of the amounts attributable to these employees of the unresponsive participating employer to remain in the MEP even if an employer has created a spinoff plan. Indeed, such a spinoff plan by the unresponsive employer rises to the level of a potential breach of fiduciary duty as it places participants' accounts at risk. Alternatively, it is more protective for participants if the MEP plan administrator were to instead distribute the money to a rollover IRA.

**D. Required Actions Following an Employer's Failure To Meet Deadlines**

The method by which the proposal attributes participant's account balances based on whether the participant is currently employed by the unresponsive employer appears punitive for participants. Instead of penalizing participants for their employer's actions over which they have no control, the IRS should require that the MEP separately account – by each employer – for employee accounts. That way, if a participant has more than one participating employer, the participant's account could be maintained with the 413(e) plan.<sup>2</sup>.

Alternatively, the proposed regulation should not differentiate in the treatment of employees who currently work or have previously worked for the unresponsive employer, especially concerning distribution of account balances. If a participant's account balance includes amounts that are only attributable to current employment with the unresponsive participating employer, and no other employer participating in the MEP, the entire account balance should be treated as attributable to employment with the unresponsive participating employer.

---

<sup>2</sup> Except for the amount of the employer's account attributable to the unresponsive employer's contribution.

AARP strongly agrees that if the participants are provided with an opportunity to elect how their accounts are treated, the default should be that the accounts remain in the plan. It is more protective and in the best interests of participants to keep those retirement monies in the plan.

Although AARP generally agrees with the content of the notices to the affected participants of the unresponsive participating employer, we suggest that the notice should be more explicit concerning two areas. First, the notice should state that regardless of whether the employer is deducting employee contributions from the employee's paychecks, the MEP is not accepting those contributions. Second, the notice should explicitly state that the default option for participants is to leave their account in the MEP.

To minimize complexity, the plan administrator should be able to rely on the participant's representation that the participant has experienced a severance from employment unless the plan administrator has actual knowledge otherwise. As one can see by the difficulty of protecting participants, AARP submits that open MEPs should not be eligible to use this exception.

#### **E. Duties of a Pooled Plan Provider**

AARP strongly supports the fiduciary requirements placed upon the PPP. The PPP must perform the administrative duties that any fiduciary performs in order to ensure that a plan meets all requirements under ERISA and the Code. AARP would also explicitly add that the PPP has the responsibility for obtaining employee contributions that were not remitted.

We appreciate the IRS's interest and commitment to ensuring that participants and beneficiaries are protected. We are willing to provide further assistance as needed.

If you have any questions, please feel free to contact Sarah Mysiewicz of our Government Affairs office at [smysiewicz@aarp.org](mailto:smysiewicz@aarp.org) or 202-434- 6763.

Sincerely,



David Certner  
Legislative Counsel and Legislative Policy Director  
Government Affairs