



[4830-01-p]

## **DEPARTMENT OF THE TREASURY**

Internal Revenue Service

26 CFR Part 1

[REG-121508-18]

Multiple Employer Plans

RIN 1545-BO97

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This document sets forth proposed regulations relating to the tax qualification of plans maintained by more than one employer. These plans, maintained pursuant to section 413(c) of the Internal Revenue Code (Code), are often referred to as multiple employer plans or MEPs. The proposed regulations would provide an exception, if certain requirements are met, to the application of the “unified plan rule” for a defined contribution MEP in the event of a failure by an employer participating in the plan to satisfy a qualification requirement or to provide information needed to determine compliance with a qualification requirement. These proposed regulations would affect MEPs, participants in MEPs (and their beneficiaries), employers participating in MEPs, and MEP plan administrators.

**DATES:** Comments and requests for a public hearing must be received by **[INSERT DATE 90 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** Submit electronic submissions via the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov) (indicate IRS and REG-121508-18) by following the online

instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comment received to its public docket, whether submitted electronically or in hard copy. Send hard copy submissions to: CC:PA:LPD:PR (REG-121508-18), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-121508-18), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Concerning the regulations, Pamela Kinard at (202) 317-6000 or Jamie Dvoretzky at (202) 317-4102; concerning submission of comments or to request a public hearing, email or call Regina Johnson at [notice.comments@irscounsel.treas.gov](mailto:notice.comments@irscounsel.treas.gov), (202) 317-5190, or (202) 317-6901 (not toll-free numbers).

## **SUPPLEMENTARY INFORMATION:**

### **Background**

This document sets forth proposed amendments to the Income Tax Regulations (26 CFR part 1) under section 413(c) of the Internal Revenue Code (Code).

Section 413(c) provides rules for the qualification of a plan maintained by more than one employer.<sup>1</sup> A section 413(c) plan is often referred to as a multiple employer plan (MEP).

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<sup>1</sup> Section 210 of the Employee Retirement Income Security Act of 1974, Public Law 93-406 (88 Stat. 829 (1974)), as amended (ERISA), also provides rules relating to plans maintained by more than one employer. Similar to section 413(c) of the Code, section 210(a) of ERISA states that the minimum participation standards, minimum vesting standards, and benefit accrual requirements under sections 202, 203, and 204 of ERISA, respectively, shall be applied as if all employees of each of the employers

Final regulations under section 413 were published in the **Federal Register** on November 9, 1979, 44 FR 65061 (the final section 413 regulations). The final section 413 regulations apply to multiple employer plans described in section 413(c) and to collectively bargained plans described in section 413(b) (plans that are maintained pursuant to certain collective-bargaining agreements between employee representatives and one or more employers).

Pursuant to section 413(c) and the final section 413 regulations, all of the employers maintaining a MEP (participating employers) are treated as a single employer for purposes of certain section 401(a) qualification requirements. For example:

- Under section 413(c)(1) and §1.413-2(b), the rules for participation under section 410(a) and the regulations thereunder are applied as if all employees of each of the employers who maintain the plan are employed by a single employer;
- Under section 413(c)(2) and §1.413-2(c), in determining whether a MEP is, with respect to each participating employer, for the exclusive benefit of its employees (and their beneficiaries), all of the employees participating in the plan are treated as employees of each such employer; and
- Under section 413(c)(3) and §1.413-2(d), the minimum vesting standards under section 411 are applied as if all employers who maintain the plan constitute a single employer.

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were employed by a single employer. Under section 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713), the Secretary of the Treasury has interpretive jurisdiction over section 413 of the Code, as well as ERISA section 210.

Other rules are applied separately to each participating employer.<sup>2</sup> For example, under §1.413-2(a)(3)(ii), the minimum coverage requirements of section 410(b) generally are applied to a MEP on an employer-by-employer basis.

A plan is not described in section 413(c) unless it is maintained by more than one employer<sup>3</sup> and is a single plan under section 414(l).<sup>4</sup> See §§1.413-2(a)(2)(i) and 1.413-1(a)(2). Under §1.414(l)-1(b), a plan is a single plan if and only if, on an ongoing basis,

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<sup>2</sup> Proposed rules at §1.413-2(e) and (f) (47 FR 54093) were issued in 1982. Proposed §1.413-2(e) would have provided that the minimum funding standard for a MEP is determined as if all participants in the plan were employed by a single employer, and proposed §1.413-2(f) would have provided rules relating to liability for the excise tax on a failure to meet the minimum funding standards. Because these rules were proposed in 1982, they do not reflect 1988 changes to section 413(c)(4) that were made by section 6058(a) of the Technical and Miscellaneous Revenue Act of 1988, Public Law 100-647 (102 Stat. 3342) (TAMRA). As amended by TAMRA, section 413(c)(4) generally provides that in the case of a plan established after December 31, 1988, and in the case of a plan established before that date for which an election was made, each employer is treated as maintaining a separate plan for purposes of the minimum funding standards. The proposed rules at §1.413-2(e) and (f) are outside the scope of these proposed regulations. Therefore, paragraphs (e) and (f) are “Reserved” for future rulemaking. The Treasury Department and the IRS note that taxpayers must take into account the statutory changes made after the issuance of the proposed regulations as of the effective dates of the relevant legislation.

<sup>3</sup> Section 1.413-2(a)(2), issued in 1979, provides that for purposes of determining the number of employers maintaining a plan, any employers described in section 414(b) that are members of a controlled group of corporations or any employers described in section 414(c) that are trades or businesses under common control, whichever is applicable, are treated as if those employers are a single employer. Because §1.413-2(a)(2) was issued in 1979, it does not address section 414(m), which was added in 1980 by section 201(a) of the Miscellaneous Revenue Act of 1980, Public Law 96-605 (94 Stat. 3521). Section 414(m) provides that all employers in an affiliated service group shall be treated as a single employer. Although amendments to §1.413-2(a)(2) are outside the scope of these proposed regulations, the Treasury Department and the IRS note that taxpayers must take into account the statutory changes made after the issuance of the proposed regulations as of the effective dates of the relevant legislation.

<sup>4</sup> On October 23, 2018 proposed Department of Labor regulations were published in the **Federal Register** (83 FR 53534) clarifying the circumstances in which employer groups or associations and professional employer organizations can constitute “employers” within the meaning of section 3(5) of ERISA for purposes of establishing or maintaining an individual account “employee pension benefit plan” within the meaning of ERISA section 3(2). Those proposed regulations state that an “employee pension benefit plan” under section 3(2) of ERISA must be established by an “employer,” defined in section 3(5) of ERISA to include an “entity acting indirectly in the interest of an employer in relation to an employee benefit plan.” The proposed Department of Labor regulations define the terms “bona fide group or association of employers” and “bona fide professional employer organization” and state that, with respect to a “multiple employer defined contribution pension plan,” these entities “shall be deemed to be able to act in the interest of an employer” provided that certain conditions are met. See proposed rules at 29 CFR 2510.3-55(a). The proposed Department of Labor regulations solicit comments on, but do not address, other types of entities that may be an employer under ERISA section 3(5).

all of the plan assets are available to pay benefits to employees who are covered by the plan and their beneficiaries.

Under §1.413-2(a)(3)(iv) (sometimes referred to as the “unified plan rule”), the qualification of a MEP is determined with respect to all employers maintaining the MEP. Consequently, §1.413-2(a)(3)(iv) provides that “the failure by one employer maintaining the plan (or by the plan itself) to satisfy an applicable qualification requirement will result in the disqualification of the MEP for all employers maintaining the plan.” Section 1.416-1, Q&A G-2, includes a similar rule relating to the qualification of a MEP, providing that a failure by a MEP to satisfy section 416 with respect to employees of one participating employer means that all participating employers in the MEP are maintaining a plan that is not a qualified plan.<sup>5</sup>

Section 1101(a) of the Pension Protection Act of 2006 (PPA ‘06), Public Law 109-280 (120 Stat. 780 (2006)), provides that the Secretary has full authority to establish and implement EPCRS<sup>6</sup> (or any successor program) and any other employee plans correction policies, including the authority to waive income, excise, or other taxes to ensure that any tax, penalty, or sanction is not excessive and bears a reasonable relationship to the nature, extent, and severity of the failure. Section 1101(b) of PPA ‘06

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<sup>5</sup> This rule is based on the unified plan rule in §1.413-2(a)(3)(iv). Therefore, if a defined contribution MEP has an unresponsive employer that fails to satisfy section 416 and the defined contribution MEP meets the conditions for the exception to the unified plan rule in these proposed regulations, the defined contribution MEP will not be disqualified for the section 416 failure. For further information, see the discussion in part II of the Explanation of Provisions section entitled Conditions for Application of Exception to the Unified Plan Rule. The rules in §1.416-1 are outside the scope of these proposed regulations, but the Treasury Department and the IRS intend to address the topic in a broader guidance project updating the regulations under section 416.

<sup>6</sup> The Employee Plans Compliance Resolution System (EPCRS) is a comprehensive system of correction programs for sponsors of certain retirement plans, including plans that are intended to satisfy the qualification requirements of section 401(a). EPCRS provides procedures for an employer to correct a plan’s failure to satisfy an applicable qualification requirement so that the failure does not result in disqualification of the plan.

provides that the Secretary shall continue to update and improve EPCRS (or any successor program), giving special attention to a number of items, including special concerns and circumstances that small employers face with respect to compliance and correction of compliance failures. EPCRS has been updated and expanded several times, most recently in Rev. Proc. 2019-19, 2019-19 I.R.B. 1086. In addition, as provided for in Section 1101 of PPA '06, the Treasury Department and the IRS are authorized to establish and implement other employee plans correction policies, outside of EPCRS.

On August 31, 2018, President Trump issued Executive Order 13847 (83 FR 45321 (Sept. 6, 2018)), titled “Strengthening Retirement Security in America” (Executive Order). The Executive Order states that it shall be the policy of the Federal Government to expand access to workplace retirement plans for American workers and that enhancing workplace retirement plan coverage is critical to ensuring that American workers will be financially prepared to retire. The Executive Order also states that, “[e]xpanding access to [MEPs], under which employees of different private-sector employers may participate in a single retirement plan, is an efficient way to reduce administrative costs of retirement plan establishment and maintenance and would encourage more plan formation and broader availability of workplace retirement plans, especially among small employers.”<sup>7</sup>

The Executive Order directs the Secretary of the Treasury to “consider proposing amendments to regulations or other guidance, consistent with applicable law and the policy set forth in ... this order, regarding the circumstances under which a MEP may

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<sup>7</sup> Id. at 45321.

satisfy the tax qualification requirements . . . , including the consequences if one or more employers that sponsored or adopted the plan fails to take one or more actions necessary to meet those requirements.”<sup>8</sup> The Executive Order further directs the Secretary of the Treasury to consult with the Secretary of Labor in advance of issuing any such proposed guidance, and the Secretary of Labor to take steps to facilitate the implementation of any guidance, as appropriate and consistent with applicable law.

Stakeholders have expressed concerns about the risk that the actions of one or more participating employers might disqualify a MEP<sup>9</sup> and that some employers are reluctant to join MEPs without an exception to the unified plan rule. In particular, they have said that the cooperation of participating employers is needed for compliance and when a participating employer refuses to take the steps needed to maintain qualification, the entire plan is at risk of being disqualified. Stakeholders assert that without an exception to the unified plan rule, many employers perceive that the benefits of joining a MEP are outweighed by the risk of plan disqualification based on the actions of an uncooperative participating employer.

## **Explanation of Provisions**

### **I. Overview**

In accordance with the Executive Order and the policy of expanding workplace retirement plan coverage, these proposed regulations, which were developed in consultation with the Secretary of Labor, would provide an exception to the unified plan

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<sup>8</sup> Id. at 45322.

<sup>9</sup> See also, U.S. Gov’t Accountability Office, GAO-12-665, “Federal Agencies Should Collect Data and Coordinate Oversight of Multiple Employer Plans” (September 2012) (<https://www.gao.gov/assets/650/648285.pdf>) (identifying the unified plan rule as a potential problem for MEPs).

rule for certain defined contribution MEPs. Under the proposed regulations, a defined contribution MEP would be eligible for the exception to the unified plan rule on account of certain qualification failures due to actions or inaction by a participating employer, if the conditions set forth in the proposed regulations are satisfied. The exception generally would be available if the participating employer in a MEP is responsible for a qualification failure that the employer is unable or unwilling to correct. It would also be available if the participating employer fails to comply with the section 413(c) plan administrator's request for information about a qualification failure that the section 413(c) plan administrator reasonably believes might exist. For the exception to the unified plan rule to apply, certain actions are required to be taken, including, in certain circumstances, a spinoff of the assets and account balances attributable to participants who are employees of such an employer to a separate plan and a termination of that plan.

For purposes of applying the exception to the unified plan rule, under the proposed regulations: (1) a section 413(c) plan administrator is defined as the plan administrator of a MEP, determined under the rules of section 414(g); (2) a participating employer is defined as one of the employers maintaining a MEP; (3) an unresponsive participating employer is defined as a participating employer in a MEP that fails to comply with reasonable and timely requests from the section 413(c) plan administrator for information necessary to determine compliance with a qualification requirement or fails to comply with reasonable and timely requests from the section 413(c) plan administrator to take actions that are needed to correct a failure to satisfy a qualification



requirement as it relates to the participating employer; and (4) an employee is defined as a current or former employee of a participating employer.

The exception to the unified plan rule would apply only in the case of certain types of failures to satisfy the qualification requirements, referred to in the proposed regulations as participating employer failures. A participating employer failure is defined as either a known qualification failure or a potential qualification failure. A known qualification failure is defined as a failure to satisfy a qualification requirement with respect to a MEP that is identified by the section 413(c) plan administrator and is attributable solely to an unresponsive participating employer. A potential qualification failure is a failure to satisfy a qualification requirement with respect to a MEP 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 MEP is in compliance with the qualification requirement as it relates to the participating employer. For purposes of the definitions of known qualification failure and potential qualification failure, an unresponsive participating employer includes any employer that is treated as a single employer with that unresponsive participating employer under section 414(b), (c), (m), or (o).

## II. Conditions for Application of Exception to Unified Plan Rule

Under the exception to the unified plan rule in the proposed regulations, a defined contribution MEP would not be disqualified on account of a participating employer failure, provided that the following conditions are satisfied: (1) the MEP

satisfies certain eligibility requirements (such as a requirement to have established practices and procedures to promote compliance and a requirement to adopt relevant plan language); (2) the section 413(c) plan administrator provides notice and an opportunity for the unresponsive participating employer to take remedial action with respect to the participating employer failure; (3) if the unresponsive participating employer fails to take appropriate remedial action with respect to the participating employer failure, the section 413(c) plan administrator implements a spinoff; and (4) the section 413(c) plan administrator complies with any information request that the IRS or a representative of the spun-off plan makes in connection with an IRS examination of the spun-off plan, including any information request related to the participation of the unresponsive participating employer in the MEP for years prior to the spinoff. A spinoff may either be a spinoff that is initiated by the unresponsive participating employer and implemented by the section 413(c) plan administrator, or a spinoff-termination implemented by the section 413(c) plan administrator pursuant to plan terms.

A. MEP's Eligibility for Exception to the Unified Plan Rule

Under the proposed regulations, a threshold condition for the exception to the unified plan rule is that the MEP meet certain eligibility requirements. Specifically, the proposed regulations would require the section 413(c) plan administrator to have established practices and procedures (formal or informal) that are reasonably designed to promote and facilitate overall compliance with applicable Code requirements, including procedures for obtaining information from participating employers. In addition, the plan document would need to include language describing the procedures that would be followed to address participating employer failures, including the procedures

that the section 413(c) plan administrator would follow if, after receiving notice from the section 413(c) plan administrator, an unresponsive participating employer fails to take appropriate remedial action or to initiate a spinoff from the MEP pursuant to the regulations.<sup>10</sup> Finally, a MEP is not eligible for the exception to the unified plan rule if, as of the date that the first notice is provided to an unresponsive participating employer, the MEP is under examination. For a description of the first notice, see part II.B. of this Explanation of Provisions section, entitled Notice Requirements.

For purposes of the proposed regulations, a plan is under examination if: (1) the plan is under an Employee Plans examination (that is, an examination of a Form 5500 series, “Annual Return/Report of Employee Benefit Plan,” or other examination by the Employee Plans Office of the Tax Exempt and Government Entities Division of the IRS (Employee Plans) (or any successor IRS office that has jurisdiction over qualified retirement plans)); (2) the plan is under investigation by the Criminal Investigation Division of the IRS (or its successor); or (3) the plan is treated as under an Employee Plans examination under special rules. Under these special rules, for example, a plan is under an Employee Plans examination if the section 413(c) plan administrator, or an authorized representative, has received verbal or written notification of an impending Employee Plans examination, or of an impending referral for an Employee Plans examination, or if a plan has been under an Employee Plans examination and the plan has an appeal pending with the IRS Office of Appeals (or its successor), or is in litigation with the IRS, regarding issues raised in the Employee Plans examination.

This definition of the term under examination is similar to the definition in

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<sup>10</sup> Once final regulations are issued, the Treasury Department and the IRS intend to publish guidance in the Internal Revenue Bulletin setting forth model language that may be used for this purpose.

EPCRS. See Rev. Proc. 2019-19, section 5.08. However, unlike in EPCRS, a plan is not under examination for purposes of these proposed regulations merely because it is maintained by an employer that is under an Exempt Organizations examination (that is, an examination of a Form 990 series or other examination by the Exempt Organizations Office of the Tax Exempt and Government Entities Division of the IRS).

#### B. Notice Requirements

The proposed regulations would require the section 413(c) plan administrator to provide up to three notices regarding a participating employer failure to the unresponsive participating employer; with the third notice, if applicable, also being provided to participants and beneficiaries and the Department of Labor.<sup>11</sup>

The first notice must describe the participating employer failure (or failures), as well as the remedial actions the unresponsive participating employer would need to take to remedy the failure and the employer's option to initiate a spinoff. The first notice must also explain the consequences under plan terms if the unresponsive participating employer neither takes appropriate remedial action with respect to the participating employer failure nor initiates a spinoff, including the possibility that a spinoff of the plan assets and account balances attributable to the employees of that employer into a separate single-employer plan would occur, followed by a termination of that plan (as discussed in this preamble under the heading Spinoff-Termination).

If, by the end of the 90-day period following the date the first notice is provided, the unresponsive participating employer neither takes appropriate remedial action nor initiates a spinoff, then no later than 30 days after the expiration of that 90-day period,

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<sup>11</sup> If the notices relate to a potential qualification failure, and the potential qualification failure becomes a known qualification failure, then a new series of notices may be required.

the section 413(c) plan administrator must provide a second notice to that employer. The second notice must include the information required to be included in the first notice, and must also inform the employer that if it fails either to take appropriate remedial action or to initiate a spinoff within 90 days after the second notice then a notice describing the participating employer failure and the consequences of not correcting that failure will be provided to participants who are employees of the unresponsive participating employer (and their beneficiaries) and to the Department of Labor.

If, by the end of the 90-day period following the date the second notice is provided, the unresponsive participating employer neither takes appropriate remedial action nor initiates a spinoff, then no later than 30 days after the expiration of that 90-day period, the section 413(c) plan administrator must provide a third notice to the unresponsive participating employer, to participants who are employees of that employer (and their beneficiaries), and to the Department of Labor.<sup>12</sup> The third notice must include the information required to be included in the first notice, the deadline for employer action, and an explanation of any adverse consequences to participants in the event that a spinoff-termination occurs, and state that the notice is being provided to participants who are employees of the unresponsive participating employer (and their beneficiaries) and to the Department of Labor.

### C. Actions by Unresponsive Participating Employer

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<sup>12</sup> The notice to the Department of Labor should be mailed to the Employee Benefits Security Administration's Office of Enforcement (or its successor office). The Office of Enforcement is currently located at 200 Constitution Ave., NW, Suite 600, Washington, DC 20210.

The proposed regulations provide that after the unresponsive participating employer has received notice of the participating employer failure, the employer has the opportunity to either take appropriate remedial action or initiate a spinoff. The final deadline for an unresponsive participating employer to take one of these actions is 90 days after the third notice is provided. The consequences of the employer's failure to meet this deadline are described in this Explanation of Provisions section under part II.E., entitled Spinoff-Termination.

The proposed regulations provide that an unresponsive participating employer takes appropriate remedial action with respect to a potential qualification failure if the employer provides data, documents, or any other information necessary for the section 413(c) plan administrator to determine whether a qualification failure exists. If (1) the unresponsive participating employer provides this information, (2) the section 413(c) plan administrator determines that, based on this information, a qualification failure exists that is attributable solely to that employer, and (3) the participating employer fails to comply with reasonable and timely requests from the section 413(c) plan administrator to take actions that are needed to correct that qualification failure, then the qualification failure becomes a known qualification failure. In that case, the MEP would be eligible for the exception to the unified plan rule with respect to the known qualification failure by satisfying the conditions with respect to that known qualification failure, taking into account the rules described in this Explanation of Provisions section under part II.D., entitled Actions by Section 413(c) Plan Administrator Relating to Remedial Action or Employer-Initiated Spinoff. An unresponsive participating employer takes appropriate remedial action with respect to a known

qualification failure if the employer takes action, such as making corrective contributions, that corrects, or enables the section 413(c) plan administrator to correct, the known qualification failure.

As an alternative to taking appropriate remedial action with respect to a potential or a known qualification failure, an unresponsive participating employer may, after receiving notice of the participating employer failure, initiate a spinoff by directing the section 413(c) plan administrator to spin off plan assets and account balances held on behalf of employees of that employer to a separate single-employer plan established and maintained by that employer in a manner consistent with plan terms. In that case, the section 413(c) plan administrator must implement that spinoff, as described in this Explanation of Provisions section under part II.D., entitled Actions by Section 413(c) Plan Administrator Relating to Remedial Action or Employer-Initiated Spinoff.

D. Actions by Section 413(c) Plan Administrator Relating to Remedial Action or Employer-Initiated Spinoff

For purposes of applying the conditions of the exception to the unified plan rule to a potential qualification failure that becomes a known qualification failure, actions taken (including notices provided) when the failure was a potential qualification failure are not taken into account. For example, a notice that the section 413(c) plan administrator provided in connection with the potential qualification failure would not satisfy the notice requirements for the known qualification failure. However, in determining whether the MEP is under examination as of the date of the first notice describing the known qualification failure, the section 413(c) plan administrator will be treated as providing that notice on the date the first notice was provided with respect to

the related potential qualification failure, but only if the following conditions are satisfied:

(1) after determining that a qualification failure exists, the section 413(c) plan administrator makes a reasonable and timely request to the participating employer to take actions that are needed to correct the failure, and (2) as soon as reasonably practicable after the participating employer fails to respond to that request, the section 413(c) plan administrator provides the first notice with respect to the known qualification failure.

The Treasury Department and the IRS anticipate revising EPCRS to provide that, if a 413(c) plan administrator provides the first notice with respect to a participating employer failure under a MEP at a time that the plan is not under examination, then the MEP will not be considered to be under examination for purposes of determining whether the participating employer failure is eligible to be corrected under the Self Correction Program or Voluntary Correction Program components of EPCRS. It is anticipated that this application of the term under examination under EPCRS will be conditioned on the 413(c) plan administrator complying with applicable conditions for the exception to the unified plan rule and, for a known qualification failure with respect to which the unresponsive participating employer takes appropriate remedial action, taking any remaining action necessary to correct the qualification failure as soon as reasonably practicable.

If an unresponsive participating employer takes appropriate remedial action with respect to a known qualification failure, then the section 413(c) plan administrator must take any remaining action necessary to correct the qualification failure. If the section 413(c) plan administrator fails to take any remaining action necessary to correct



the known qualification failure, the exception to the unified plan rule will not apply and the section 413(c) plan may be disqualified on account of that failure.

If, instead of taking appropriate remedial action (as described in part II.C. of this Explanation of Provisions, entitled Actions by Unresponsive Participating Employer), an unresponsive participating employer initiates a spinoff of plan assets and account balances held on behalf of employees of that employer to a separate single-employer plan established and maintained by that employer, the section 413(c) plan administrator must implement and complete a spinoff of the plan assets and account balances held on behalf of the employees of the employer that are attributable to employment by the employer within 180 days of the date on which it was initiated. The section 413(c) plan administrator must also report the spinoff to the IRS (in the manner prescribed by the IRS in forms, instructions, and other guidance).

#### E. Spinoff-Termination

If, after the first notice of a participating employer failure is provided, the unresponsive participating employer neither takes appropriate remedial action nor initiates a spinoff by the date that is 90 days after the third notice is provided, then, for the exception to the unified plan rule to apply, there must be a spinoff of the plan assets and account balances held on behalf of employees of the unresponsive participating employer that are attributable to their employment with that employer to a separate plan, followed by a termination of that plan. The spinoff-termination must be pursuant to plan terms and in accordance with the proposed regulations. The MEP will satisfy this condition, if, as soon as reasonably practicable after the deadline for action by the unresponsive participating employer, the section 413(c) plan administrator: (1) provides

notice of the spinoff-termination to participants who are employees of the unresponsive participating employer (and their beneficiaries); (2) stops accepting contributions from the unresponsive participating employer; (3) implements a spinoff, in accordance with the transfer requirements of section 414(l) and the anti-cutback requirements of section 411(d)(6), of the plan assets and account balances held on behalf of employees of the unresponsive participating employer that are attributable to their employment by that employer to a separate single-employer plan and trust that has the same plan administrator, trustee, and substantive plan terms as the MEP; and (4) terminates the spun-off plan and distributes assets of the spun-off plan to plan participants and beneficiaries as soon as reasonably practicable after the plan termination date.<sup>13</sup>

In terminating the spun-off plan, the section 413(c) plan administrator must:

- Reasonably determine whether, and to what extent, the survivor annuity requirements of sections 401(a)(11) and 417 apply to any benefit payable under the plan and take reasonable steps to comply with those requirements (if applicable);
- Provide each participant and beneficiary with a nonforfeitable right to his or her accrued benefits as of the date of plan termination, subject to income, expenses, gains, and losses between that date and the date of distribution; and

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<sup>13</sup> The Pension Benefit Guaranty Corporation's Missing Participants Program provides a mechanism for distributing assets to plan participants in a terminating plan. See 29 CFR 4050.201 through 4050.207. Use of the Pension Benefit Guaranty Corporation's Missing Participants Program is optional for defined contribution plans. Under the program, the Pension Benefit Guaranty Corporation locates participants and beneficiaries who were missing when their plans terminated. When found, depending on arrangements made by the plan, the Pension Benefit Guaranty Corporation either provides the benefit or information about where the participant's account is being held.

- Notify the participants and beneficiaries of their rights under section 402(f).

In providing notice of the spinoff-termination to participants (and their beneficiaries), the section 413(c) plan administrator must provide information relating to the spinoff-termination to participants who are employees of the unresponsive participating employer (and their beneficiaries), including the following: (1) identification of the MEP and contact information for the section 413(c) plan administrator; (2) the effective date of the spinoff-termination; (3) a statement that no more contributions will be made to the MEP; (4) a statement that as soon as practicable after the spinoff-termination, participants and beneficiaries will receive a distribution from the spun-off plan; and (5) a statement that before the distribution occurs, participants and beneficiaries will receive additional information about their options with respect to that distribution.

The section 413(c) plan administrator must report the spinoff-termination to the IRS (in the manner prescribed by the IRS in forms, instructions, and other guidance).

### III. Other Rules

#### A. Form of Notices

Any notices required to be provided under the proposed regulations may be provided in writing or in electronic form. For notices provided to participants and beneficiaries, see generally §1.401(a)-21 for rules permitting the use of electronic media to provide applicable notices to recipients with respect to retirement plans.

#### B. Qualification of Spun-Off Plan

In the case of any plan that is spun off in accordance with the proposed regulations, any participating employer failure that would have affected the qualification

of a MEP, but for the application of the exception to the unified plan rule, will be a qualification failure with respect to the spun-off plan. In the case of an employer-initiated spinoff, see EPCRS (or its successors) for rules relating to correcting qualification failures.

Under the authority provided by section 1101 of PPA '06, the proposed regulations provide that distributions made from a spun-off plan that is terminated in accordance with these regulations would not, solely because of the participating employer failure, fail to be eligible for favorable tax treatment accorded to distributions from qualified plans (including that the distributions will be treated as eligible rollover distributions under section 402(c)(4)), except as provided in the next paragraph. Under section 1101 of PPA '06, Congress gave the Secretary broad authority to establish employee plans correction policies. In developing a correction policy for MEPs, it is appropriate to treat distributions to rank-and-file participants following a spinoff-termination as eligible for tax-favored treatment in order to ensure that the tax or sanction is not excessive and bears a reasonable relationship to the nature of the failure.<sup>14</sup>

The regulations also provide that, notwithstanding the general rule regarding favorable tax treatment for distributions from a plan following spinoff-termination, the IRS reserves the right to pursue appropriate remedies under the Code against any party (such as the owner of the participating employer) who is responsible for the participating employer failure resulting in the spinoff-termination. The IRS may pursue appropriate

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<sup>14</sup> In addition, a participating employer failure could either be a known qualification failure or a potential qualification failure. Treating distributions from a spun-off and terminated plan relating to a potential qualification failure as ineligible for tax-favored treatment does not bear a reasonable relationship to the nature of the failure.

remedies against a responsible party even in the party's capacity as a participant or beneficiary under the plan that is spun off and terminated (such as by not treating a plan distribution made to the responsible party as an eligible rollover distribution). This is similar to the approach adopted in EPCRS with respect to terminating orphan plans. See Rev. Proc. 2019-19, section 6.02(2)(e)(i).

The proposed regulations also provide that the Commissioner may provide additional guidance, such as in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin, or in forms and instructions, that the Commissioner determines to be necessary or appropriate with respect to the requirements of the regulations.

### **Proposed Applicability Date**

These regulations generally are proposed to apply on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. Until regulations finalizing these proposed regulations are issued, taxpayers may not rely on the rules set forth in these proposed regulations.

### **Availability of IRS Documents**

For copies of recently issued revenue procedures, revenue rulings, notices and other guidance published in the Internal Revenue Bulletin, please visit the IRS Web site at [www.irs.gov](http://www.irs.gov) or contact the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

### **Special Analyses**

#### I. Regulatory Impact Analysis

Executive Orders 13771, 13563, and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits, including potential economic, environmental, public health and safety effects, distributive impacts, and equity. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Executive Order 13771 designation for any final rule resulting from the proposed regulation will be informed by comments received. The preliminary Executive Order 13771 designation for this proposed rule is deregulatory.

The proposed regulation has been designated by the Office of Information and Regulatory Affairs (OIRA) as significant under Executive Order 12866 pursuant to the Memorandum of Agreement (MOA, April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations.

#### 1. Introduction and Need for Regulation

The U.S. retirement system is comprised of three main pillars of savings: Social Security, workplace pension plans, and individual savings. Yet, roughly 30% of American workers lack access to an employer-sponsored savings vehicle (See Table 1 in Section 7 of this Regulatory Impact Analysis, entitled Tables). This is particularly true for employees at small firms, who are roughly half as likely to have access to a retirement plan compared to employees at large firms. This would lead to larger firms enjoying a competitive advantage in labor markets. One factor that may prevent small firms from offering a plan includes the high administrative costs associated with compliance. In order to receive preferential tax treatment, a plan must meet certain

criteria specified in the Code and ensuring that those requirements are met can be costly. Furthermore, the costs associated with managing funds in retirement plans tends to be higher for a smaller pool of assets (See Table 3 in Section 7, later), which is more likely to be the case for smaller firms with fewer employees.

One solution that has developed for reducing these administrative and asset management costs is the MEP, through which different employers can form a single plan to take advantage of economies of scale. Under the current regulations under section 413(c), however, the unified plan rule creates a situation whereby should one employer fail to comply with the qualification requirements, then the preferential tax status for a qualified plan is lost for the entire MEP. The proposed regulation provides an exception to the unified plan rule for certain defined contribution MEPs, permitting compliant participating employers to continue to maintain a qualified plan if certain conditions are satisfied. Reducing the perceived risk that a MEP will be disqualified could lead to more small employers to adopt these plans.

## 2. Affected Entities

Based on the latest available data, as shown in Table 2, there are about 4,630 defined contribution MEPs with approximately 4.4 million total participants, 3.7 million of whom are active participants. Defined contribution MEPs hold about \$181 billion in assets. Fifty-six percent of defined contribution MEP participants are in MEPs with 10,000 or more participants, and 98% are in MEPs with 100 or more participants. As noted earlier, about 30% of employees do not have access to a retirement savings plan through their employer. The proposed regulation, which is limited to defined contribution MEPs, may encourage both the creation of new defined contribution MEPs

and the expansion of existing defined contribution MEPs. As a result of the proposed regulation, the cost of providing some existing employer-sponsored retirement plans could fall, and some employees would gain access to employer-sponsored retirement plans.

### 3. Baseline

The analysis in this section compares the proposed regulation to a no-action baseline reflecting anticipated Federal income tax-related behavior in the absence of these proposed regulations.

### 4. Benefits

#### a. Expanded Access to Coverage

Generally, employees rarely choose to save for retirement outside of the workplace, despite having options to save in tax-favored savings vehicles on their own; only about 10% of households without access to an employer-sponsored plan made contributions to traditional or Roth IRAs for 2014.<sup>15</sup> Thus, the availability of workplace retirement plans is a significant factor affecting whether individuals save for their retirement. Yet, despite the advantages of workplace retirements plans, access to such plans for employees of small businesses is relatively low.

The MEP structure may address significant concerns from employers about the costs to set up and administer retirement benefit plans. In order to participate in a MEP, employers would simply execute a participation agreement or similar instrument setting forth the rights and obligations of the MEP and participating employers. Each participating employer would then be participating in a single plan, rather than

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<sup>15</sup> Based on tabulations from the Office of Tax Analysis' microsimulation model.



sponsoring its own separate plan. The individual employers would not be directly responsible for the MEP's overall compliance with reporting and disclosure obligations. Accordingly, the MEP structure may address small employers' concerns regarding the cost associated with fiduciary liability of sponsoring a retirement plan by effectively transferring much of the legal risks and responsibilities to professional fiduciaries who would be responsible for managing plan assets and selecting investment menu options, among other things. Participating employers' continuing involvement in the day-to-day operations and administration of their MEP generally would be limited to enrolling employees and forwarding employee and employer contributions to the plan. Thus, participating employers would keep more of their day-to-day focus on managing their businesses, rather than their retirement plans.

The proposed regulation would reduce the risk to small businesses participating in a MEP. Currently, if one participating employer fails to meet the qualification requirements in the Code for preferential tax treatment, then the entire plan may be disqualified, and employers participating in a MEP and their employees would lose the tax benefits of participating in a qualified retirement plan (deduction for contributions, exclusion of investment returns, deferred income recognition for employees). As a result, the current rule imposes an undue burden on employers who satisfied their requirements but happened to have a bad actor among their plan's other employers. The proposed regulation minimizes this burden by allowing noncompliant or unresponsive participating employers to be dealt with separately while the other participating employers maintain a qualified plan. Thus, the risk taken on by any one participating employer when joining a MEP is reduced as the employer no longer needs

to consider the actions of other participating employers over which the employer exerts no control. The proposed regulation may therefore encourage formation of additional MEPs, as well as expanded participation in existing MEPs.

Because more plan formation and broader availability of such plans is likely to occur due to the proposed regulations, especially among small employers, the Treasury Department has determined that the proposed regulation would increase access to retirement plans for many American workers. However, the Treasury Department does not have sufficient data to determine precisely the likely extent of increased participation by small employers under the proposed regulation.

b. Reduced Fees and Administration Savings

Most MEPs could be expected to benefit from scale advantages that small businesses do not currently enjoy and to pass on some of the savings to participating employers and employees. Grouping small employers together into a MEP may facilitate savings through administrative efficiencies (economies of scale) and potentially through price negotiation (market power).

As scale increases, MEPs would spread fixed costs over a larger pool of participating employers and employee participants. Scale efficiencies can be very large with respect to asset management and may be smaller, but still meaningful, with respect to recordkeeping. Also, as scale increases, so does the negotiating power of MEPs. Negotiating power matters when competition among financial services providers is less than perfect, and they can command greater profits than in an environment with perfect competition. Very large plans may exercise their own market power to negotiate lower prices, translating into savings for member employees and employee participants.

Sometimes, scale efficiencies would not translate into savings for small employer members and their employee participants because regulatory requirements applicable to large MEPs may be more stringent than those applicable to most separate small plans. For example, some small plans are exempt from annual reporting requirements, and many others are subject to more streamlined reporting requirements than larger plans. But in most cases, the savings from the scale efficiency of MEPs would be greater than the savings from scale efficiencies that other providers of bundled financial services may offer to small employers.

First, the legal status of MEPs as a single large plan may streamline certain regulatory burdens under the Code and title I of ERISA. For example, a MEP can file a single annual return/report and obtain a single bond in lieu of the multiple reports and bonds necessary when other providers of bundled financial services administer many separate plans.

Second, relative to separate small employer plans, a MEP operating as a large single plan would likely secure substantially lower prices from financial services companies. Asset managers commonly offer proportionately lower prices, relative to assets invested, to larger investors, under so-called tiered pricing practices. For example, investment companies often offer lower-priced mutual fund share classes to customers whose investments in a fund surpass specified break points. These lower prices may reflect scale economies in any or all aspects of administering larger accounts, such as marketing, distribution, asset management, recordkeeping, and transaction processing. MEPs that are larger would likely qualify for lower pricing

compared with separate plans of small employers. MEP participants that benefit from lower asset-based fees would enjoy superior investment returns net of fees.

The availability and magnitude of scale efficiencies may be different with respect to different retirement plan services. For example, asset management generally enjoys very large-scale efficiencies. Investors of all kinds generally benefit by investing in large co-mingled pools. Even within large pools, however, small investors often pay higher fees than larger ones. Investors with more assets to invest may pay lower costs when using mutual funds as investment vehicles.

As with asset management, scale efficiencies often are available with respect to other plan services. For example, the marginal costs of services such as marketing and distribution, account administration, and transaction processing often decrease as customer size increases. Similarly, small pension plans sometimes incur high distribution costs, reflecting commissions paid to agents and brokers who sell investment products to plans. MEPs, as large customers, may enjoy scale efficiencies in the acquisition of such services. It is also possible, however, that the cost to MEPs of servicing many small employer-members may diminish or even offset such efficiencies. Stated differently, MEPs' scale efficiencies may not always exceed the scale efficiencies from other providers of bundled financial services used by small employers that sponsor separate plans. In addition, even if MEPs are able to enjoy scale efficiencies greater than the scale efficiencies available from other providers of bundled financial services, the scale efficiencies of MEPs catering to small businesses would still likely be smaller than the scale efficiencies enjoyed by very large single-employer plans.

By reducing the risk to employers of participating in a MEP, the proposed regulation would allow more MEPs to be established and to pursue scale advantages. It would also extend scale advantages to some existing MEPs that otherwise might have been too small to achieve them and to small employers that absent the proposed regulation would have offered separate plans (or no plans), but that under this proposed regulation may participate in a MEP.

While MEP's scale advantages may be smaller than the scale advantages enjoyed by very large single-employer plans, it nonetheless is illuminating to consider the savings historically enjoyed by the latter. For an illustration of how much investment fees vary based on the amount of assets in a 401(k) plan, see Table 3 in Section 7 of this Regulatory Impact Analysis entitled Tables. The table focuses on mutual funds, which are the most common investment vehicle in 401(k) plans, and shows that the average expense ratio is inversely related to plan size. There are some important caveats to interpreting Table 3. The first is that it does not include data for most of the smallest plans since plans with fewer than 100 participants generally are not required to submit audited financial statements with their Form 5500. The second is that there is variation across plans in whether and to what degree the cost of recordkeeping is included in the expense ratios.

Another method for comparing plan size advantages is a broader measure called "total plan cost" calculated by BrightScope that includes fees reported on the audited Form 5500. As Table 4 shows, total plan cost yields generally similar results about the cost differences facing small and large plans. Deloitte Consulting LLP, for the

Investment Company Institute, conducted a survey of 361 defined contributions plans.<sup>16</sup> The study calculates the “all-in” fee that is comparable across plans, and included both administrative and investment fees paid by the plan and participants. Generally, small plans with 10 or fewer participants are paying approximately 50 basis points more than plans with more than 1,000 participants. Generally, small plans with 10 or fewer participants are paying about 90 basis points more than large plans with more than 50,000 participants.

The research studies described under this heading, Reduced Fees and Administrative Costs, show that small plans and their participants generally pay higher fees than large plans and their participants. Because this rule would give many small employers the incentive to join a MEP, some of which may become very large plans, many of these employers would likely incur lower fees. Many employers that are not currently offering any retirement plan may join a MEP, leading their employees to save for retirement. Many employers already sponsoring a retirement plan might decide to join a MEP instead. If there are lower fees in the MEPs than in their previous plans, those lower fees would translate into higher savings.

c. Reduced Reporting and Audit Costs

The potential for MEPs to enjoy reporting cost savings merits separate attention because this potential is shaped not only by economic forces, but also the reporting requirements applicable to different plans. On the one hand, a MEP, as a single ERISA

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<sup>16</sup> Deloitte Consulting and Investment Company Institute, “Inside the Structure of Defined Contribution/401(k) Plan Fees, 2013: A Study Assessing the Mechanics of the ‘All-in’ Fee” (Aug. 2014) (available at <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/human-capital/us-cons-401k-fee-study-2013-082014.pdf>).

plan, can file a single report and conduct a single audit, while separate plans may be required to file separate reports and conduct separate audits. On the other hand, a MEP, as a large plan generally is subject to more stringent reporting and audit requirements than a small plan, which likely files no or streamlined reports and undergoes no audits. With respect to reporting and audits, MEPs may offer more savings to medium-sized employers (with 100 or more retirement plan participants) that are already subject to more stringent reporting and audit requirements than to small employers. Small employers that otherwise would have fallen outside of reporting and audit requirements sometimes would incur slightly higher costs by joining MEPs. This cost increase may still be offset by benefits described in other sections. From a broader point of view, if auditing becomes more prevalent because small employers join MEPs, that would lead to more and better quality data that would improve security for employers, participants and beneficiaries.

Sponsors of ERISA-covered retirement plans generally must file a Form 5500 annually, with all required schedules and attachments. The cost burden incurred to satisfy the Form 5500 related reporting requirements varies by plan type, size and complexity. Analyzing the 2016 Form 5500 filings, the Department of Labor estimates that the average cost to file the Form 5500 is as follows: \$276 per filer for small (generally less than 100 plan participants) single-employer defined contribution plans eligible for Form 5500-SF; \$437 per filer for small single-employer defined contribution plans not eligible to file Form 5500-SF; and \$1,686 per filer for larger (generally 100 participants or more) single-employer defined contribution plans, plus the cost of an audit.

Additional schedules and reporting may be required for large and complex plans. For example, large retirement plans are required to attach auditor's reports to their Form 5500. Most small plans are not required to obtain or attach such reports. Hiring an auditor and obtaining an audit report can be costly for plans, and audit fees may increase as plans get larger or if plans are more complex. A recent report states that the fee to audit a 401(k) plan ranges between \$6,500 and \$13,000.<sup>17</sup>

If an employer joins a MEP, it may save some costs associated with filing Form 5500 and fulfilling audit requirements to the extent the MEP is considered a single plan under ERISA. Thus, one Form 5500 and audit report would satisfy the reporting requirements, and each participating employer would not need to file its own, separate Form 5500 and, for large plans or those few small plans that do not meet the small plan audit waiver, an audit report. Assuming reporting costs are shared by participating employers within a MEP, an employer joining a MEP can save virtually all the reporting costs discussed above. Large plans may enjoy even higher cost savings if audit costs are taken into account.

It is less clear whether the self-employed would experience similar reporting cost savings by joining a MEP. The Department of Labor estimated these potential cost savings by comparing the reporting costs of an employer that participates in a MEP rather than sponsoring its own plan. However, several retirement savings options are already available for self-employed persons, and most have minimal or no reporting

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<sup>17</sup>See <https://www.thayerpartnersllc.com/blog/the-hidden-costs-of-a-401k-audit>. However, in a comment letter received by the Department of Labor in response to its October 23, 2018 (83 FR 53534), proposed rule clarifying the circumstances under which an employer group or association or PEO may sponsor a MEP, an association reported that the cost of its MEP audit was \$24,000. See comment letter #6 Employers Association of New Jersey, EANJ at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB88/00006.pdf>.



requirements. For example, both SEP IRA and SIMPLE IRA plans are available for small employers and the self-employed and neither option requires Form 5500 filings. Solo 401(k) plans are also available for self-employed persons, and they may be exempt from the Form 5500-EZ reporting requirement if plan assets are less than \$250,000. Thus, if self-employed individuals join a MEP, they would be unlikely to realize reporting cost savings. In fact, it is possible that their reporting costs may slightly increase, because the self-employed would share reporting costs with other MEP participating employers that they would otherwise not incur.<sup>18</sup>

d. Reduced Bonding Costs

The potential for bonding cost savings in MEPs merits separate attention. As noted above, ERISA section 412 and related regulations generally require every fiduciary of an employee benefit plan and every person who handles funds or other property of such a plan to be bonded. ERISA's bonding requirements are intended to protect employee benefit plans from risk of loss due to fraud or dishonesty on the part of persons who handle plan funds or other property, generally referred to as plan officials. A plan official must be bonded for at least 10 percent of the amount of funds he or she handles, subject to a minimum bond amount of \$1,000 per plan with respect to which the plan official has handling functions. In most instances, the maximum bond amount that can be required under ERISA with respect to any one plan official is \$500,000 per

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<sup>18</sup> However, self-employed participants, like all participants in small plans, would benefit from these enhanced audit and reporting requirements.

plan; however, the maximum required bond amount is \$1,000,000 for plan officials of plans that hold employer securities.<sup>19</sup>

Under the proposed regulation, MEPs generally might enjoy lower bonding costs than would an otherwise equivalent collection of small, separate plans, for two reasons. First, it might be less expensive to buy one bond covering a large number of individuals who handle plan funds than a large number of bonds covering the same individuals separately or in small, more numerous groups. Second, the number of people handling plan funds and therefore subject to ERISA's bonding requirement in the context of a MEP may be smaller than in the context of an otherwise equivalent collection of smaller, separate plans.

e. Increased Retirement Savings

The various effects of this rule, if finalized, may lead in aggregate to increased retirement savings. As discussed above, many employees would likely go from not having any access to a retirement plan to having access through a MEP. This has the potential to result in an increase in retirement savings, on average, for this group of employees. While some employees may choose not to participate, surveys indicate that a large number would participate. For a defined contribution pension plan, about 73 percent of all employees with access participate in the plan.<sup>20</sup> Among employees whose salary tends to be in the lowest 10 percent of the salary range, this figure is about 40 percent.<sup>21</sup> One reason that these take-up rates are relatively high is that many

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<sup>19</sup> See DOL Field Assistance Bulletin 2008-04, <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2008-04>.

<sup>20</sup> U.S. Bureau of Labor Statistics, National Compensation Survey, Employee Benefits in the U.S. (March 2018).

<sup>21</sup> Id.

plans use automatic enrollment to enroll newly hired employees, as well as, sometimes existing employees. Automatic enrollment is particularly prevalent among large plans; in 2017 about 74 percent of plans with 1,000-4,999 participants used automatic enrollment, while only about 27 percent of plans with 1-49 participants did.<sup>22</sup>

Some workers may be saving in an IRA, either in an employer-sponsored IRA, payroll deduction IRA, or on their own. If they begin participating in a MEP 401(k), they would have the opportunity to take advantage of higher contribution limits, and some individuals may begin receiving employer contributions when participating in a MEP when they did not previously.

In general, MEPs may offer participants a way to save for retirement with lower overall costs. In particular, the fees are likely to be lower than in most small plans and in retail IRAs. The savings in fees would result in higher investment returns and thus higher retirement savings.

f. Increased Labor Market Efficiency

The increased prevalence of MEPs would allow small employers the opportunity to offer retirement benefits that are comparable to what large employers provide. Since employees value retirement benefits, this development would tend to shift talented employees toward small businesses. Moreover, certain groups such as secondary earners in high income families who have high marginal tax rates, and therefore larger benefits from tax-preferred savings, might now be more inclined to work for small businesses as those businesses might now offer a retirement plan. Such shifts would

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<sup>22</sup>Plan Sponsor Council of America, “61<sup>st</sup> Annual Survey of Profit Sharing and 401(k) Plans, Reflecting 2017 Plan Experience” (2018), Table 111.

make small businesses more competitive. The ensuing reallocation of talent across different sectors of the economy would increase efficiency.

## 5. Costs

While the proposed regulation effectively lowers the cost of participation in a MEP among employers, the rule may also lead to increased levels of noncompliance. For example, the section 413(c) plan administrator may become less diligent about ensuring that participating employers within a MEP are responsible employers. By potentially increasing noncompliance, the proposed regulation would impose new costs on section 413(c) plan administrators who are ultimately responsible for managing unresponsive employers. In particular, for a plan to maintain its tax-favored status, the section 413(c) plan administrator is required to send notice to an unresponsive employer giving it 90 days to remedy the situation. If the unresponsive employer fails to comply, the plan administrator must send a second notice and then a final notice if the unresponsive employer still fails to comply after specified time periods. In the event of the initiation of the spinoff process, in which assets associated with an unresponsive employer are separated into a new plan that is then terminated, additional costs from the resulting compliance measures will be incurred by the section 413(c) plan administrator, who among other things is tasked with notifying all impacted participants and beneficiaries. These additional costs may be directly passed on to unresponsive employers. However, it's possible that section 413(c) plan administrators may spread these costs across all participating employers that would either absorb or pass those costs on to their employees.

The proposed regulation may also indirectly lead to an increase in investment fees by increasing uncertainty in the size of a MEP's asset pool. For example, a plan may shrink considerably when assets of an unresponsive participating employer are spun off depending on that employer's share of the total asset pool. Since the cost savings in investment fees is derived from economies of scale, introducing uncertainty in plan size might induce management companies to increase prices to account for that risk. This cost would likely be spread across all employers participating in the MEP that might then pass those costs on to their employees.

More general concerns pertaining to MEPs include their potential for abuse, such as fraud, mishandling of plan assets, or charging excessive fees.<sup>23</sup> Relative to single-employer plans, MEPs may be more susceptible to abuse since coordination across participating employers may lead to confusion regarding each individual firm's fiduciary responsibilities. On the other hand, the enhanced disclosure and audit requirements applicable to large plans, together with the increased number of employers participating in a plan, might call attention to abuses that would have otherwise gone unnoticed had a small employer established its own plan.

## 6. Regulatory Alternatives

The Treasury Department and the IRS considered alternatives to the proposed regulation. One alternative would have been to extend the proposed regulations to include defined benefit MEPs. However, this alternative was rejected because defined benefit plans raise additional issues, including issues arising from the minimum funding requirements and spinoff rules, such as the treatment in such a spinoff of any plan

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<sup>23</sup> (83 FR 53534) (October 23, 2018).

underfunding or overfunding. Commenters are asked, in the Comments and Requests for Public Hearing section of the preamble, to address those issues, as well as the circumstances in which the exception to the unified plan rule should be available to defined benefit plans.

The Treasury Department and the IRS also considered whether the proposed regulation should include a more streamlined process for a section 413(c) plan administrator to satisfy the requirements for the exception to the unified plan rule. However, the notice requirements are intended to ensure that the affected participating employers and their employees are aware of the adverse consequences if the unresponsive participating employer neither takes appropriate remedial action nor initiates a spinoff, and the timing requirements are intended to give the unresponsive participating employer an adequate opportunity to take that remedial action or initiate a spinoff. These procedural requirements strike a balance between providing protection for unresponsive participating employers and their employees and not unduly burdening defined contribution MEPs. In the Comments and Requests for Public Hearing section of the preamble, commenters are asked to address whether the regulations should add mechanisms to avoid the potential for repetitive notices, as well as whether additional procedures should be added to facilitate the resolution of disputes between a section 413(c) plan administrator and an unresponsive participating employer.

7. Tables

TABLE 1—RETIREMENT PLAN COVERAGE BY EMPLOYER SIZE

Establishment size: Number of workers	Workers:		Establishments:
	<i>Share with access to a retirement plan (%)</i>	<i>Share participating in a retirement plan (%)</i>	<i>Share offering a retirement plan (%)</i>
1-49.....	49	34	45
50-99.....	65	46	75
100-499.....	79	58	88
500+.....	89	76	94
All.....	66	50	48

Source: These statistics apply to private industry. U.S. Bureau of Labor Statistics, National Compensation Survey, Employee Benefits in the U.S. (March 2018).

TABLE 2—CURRENT STATISTICS ON MEPS

	Number of MEPS	Total Participants	Active Participants	Total Assets
MEP Defined Contribution Plans.	4,630	4.4 million	3.7 million	\$181 billion.
As a share of all ERISA Defined Contribution Plans	0.7%	4.4%.	4.6%.	3.2%.
MEP Defined Contribution Plans	4,630	4.4 million	3.7 million	\$181 billion.
401(k) Plans	4,391	4.1 million	3.4 million	\$166 billion.
Other Defined Contribution Plans	239	0.4 million	0.3 million	\$15 billion.

Source: The Department of Labor performed these calculations using the 2016 Research File of Form 5500 filings. The estimates are weighted and rounded, which means they may not sum precisely. These estimates were derived by classifying a plan as a MEP if it indicated “multiple employer plan” status on the Form 5500 Part 1 Line A and if it did not report collective bargaining.

TABLE 3—AVERAGE EXPENSE RATIOS OF MUTUAL FUNDS IN 401(K) PLANS IN BASIS POINTS, 2015

Plan Assets	Domestic equity mutual funds	International equity mutual funds	Domestic bond mutual funds	International bond mutual funds	Target date mutual funds	Balanced mutual funds (non-target date)
\$1M-\$10M	81	101	72	85	79	80
\$10M-\$50M	68	85	59	77	68	64
\$50M-\$100M	55	72	44	66	54	50
\$100M-\$250M	52	68	40	64	55	45
\$250M-\$500M	49	63	36	67	50	42
\$500M-\$1B	45	60	33	65	50	39
More than \$1B	36	52	26	65	48	32

Source: Average expense ratios are expressed in basis points and asset-weighted. The sample includes plans with audited 401(k) filings in the BrightScope database for 2015 and comprises 15,110 plans with \$1.4 trillion in mutual fund assets. Plans were included if they had at least \$1million in assets and between 4 and 100 investment options. BrightScope/ICI, “The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans, 2015” (March 2018).

TABLE 4—LARGER PLANS TEND TO HAVE LOWER FEES OVERALL

Plan Assets	Total Plan Cost (in basis points)		
	<i>10<sup>th</sup> Percentile</i>	<i>Median</i>	<i>90<sup>th</sup> Percentile</i>
\$1M-\$10M	75	111	162
\$10M-\$50M	61	91	129
\$50M-\$100M	37	65	93
\$100M-\$250M	22	54	74
\$250M-\$500M	21	48	66
\$500M-\$1B	21	43	59
More than \$1B	14	27	51

Source: Data is plan-weighted. The sample is plans with audited 401(k) filings in the BrightScope database for 2015, which comprises 18,853 plans with \$3.2 trillion in assets. Plans were included if they had at least \$1 million in assets and between 4 and 100 investment options. BrightScope/ICI, “The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans, 2015” (March 2018).

II. Paperwork Reduction Act

The collection of information in these proposed regulations is in: §1.413-2(g)(3)(i)(B) (requirement to adopt plan language); §1.413-2(g)(4) (requirement to provide notice with respect to a participating employer failure); §1.413-2(g)(7)(i)(C) (requirement that spun-off plan have the same substantive terms as MEP); and §1.413-



2(g)(7)(i)(A) (requirement to provide notice of a spinoff-termination). The collection of information contained in proposed §1.413-2(g) will be carried out by plan administrators of defined contribution MEPs seeking to satisfy the conditions for the exception to the unified plan rule. The collection of information in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)).

1. Plan Amendment Adoption Requirement, §1.413-2(g)(3)(i)(B)

Section 1.413-2(g)(3)(i)(B) states that as a condition of the exception to the unified plan rule, a defined contribution MEP must be amended to include plan language that describes the procedures that would be followed to address participating employer failures, including the applicable procedures that apply if an unresponsive participating employer does not respond to the section 413(c) plan administrator's requests to remedy the failures.

A defined contribution MEP will not be eligible for the exception to the unified plan rule if it does not satisfy this plan-language requirement. Without it, the defined contribution MEP will not be able to avail itself of the exception to the unified plan rule, and will continue to be at risk of disqualification due to the actions or inactions of a single unresponsive participating employer. Since only one amendment is required, this is a one-time paperwork burden for each defined contribution MEP. In addition, after final regulations are issued, the IRS intends to publish a model plan amendment, which will help to minimize the burden.

We estimate that the burden for this requirement under the Paperwork Reduction Act of 1995 will be three hours per defined contribution MEP. Given the size of the

burden and the potential benefits of satisfying the exception to the unified plan rule, we estimate that approximately 80 percent of defined contribution MEPs (3,704 MEPs<sup>24</sup>) will amend their plans to satisfy this condition. Therefore, the total burden of this requirement is estimated to be 11,112 hours (3,704 defined contribution MEPs times three hours). However, because each defined contribution MEP that adopts an amendment will do so on a one-time basis, to determine an annual estimate, the total time is divided by three, or 3,704 hours annually (3,704 defined contribution MEPs times one hour).

## 2. Notice Requirements, §1.413-2(g)(4)

Notice is another condition of the exception to the unified plan rule. The proposed regulations would require a section 413(c) plan administrator to send up to three notices informing the unresponsive participating employer of the participating employer failure and the consequences if the employer fails to take remedial action or initiate a spinoff from the defined contribution MEP. After each notice is provided, the employer has 90 days to take appropriate remedial action or initiate a spinoff from the defined contribution MEP. If the employer takes those actions after the first or second notice is provided, subsequent notices are not required. Thus, it is possible that a section 413(c) plan administrator will send fewer than three notices to an employer. However, because the notice requirements only apply if an employer has already been unresponsive to the section 413(c) plan administrator's requests, we have estimated that in most cases, all three notices will be provided.

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<sup>24</sup> This calculation uses data from the 2016 Form 5500, "Annual Return/Report of Employee Benefit Plan." As noted earlier, these filings indicate that there are approximately 4,630 defined contribution MEPs.

We estimate that the burden of preparing the three notices will be three hours. Most of this burden relates to the first notice, which must describe the qualification failure and the potential consequences if the employer fails to take action to address it. The burdens of preparing the second and third notices are expected to be relatively insignificant, given that these notices must generally repeat the information that was included in the first notice. We estimate that approximately 33.3 percent of all defined contribution MEPs (1,542 defined contribution MEPs) have or will have an unresponsive participating employer, necessitating the sending of these notices on an annual basis. Therefore, we estimate a burden of 4,626 hours (1,542 defined contribution MEPs times three hours). We expect to be able to adjust these estimates based on experience after the regulations are finalized.

Section 1.413-2(g)(4) also includes the burden of notice distribution. All three notices must be sent to the unresponsive participating employer. The third notice will also be provided to plan participants who are employees of the unresponsive participating employer and to the Department of Labor. We estimate that, on average, a section 413(c) plan administrator will send the third notice to approximately 50 recipients (employees of the unresponsive participating employer, the employer, and the Department of Labor). We expect that the burden of distributing these notices will be two hours per defined contribution MEP, for a total burden of 3,084 hours (1,542 defined contribution MEPs times two hours).

### 3. Terms of Spun-off Plan, §1.413-2(g)(7)(i)(C)

After the third notice is provided, §1.413-2(g)(7)(i)(C) requires a section 413(c) plan administrator to implement a spinoff of the plan assets attributable to employees of

an unresponsive participating employer. The assets must be spun-off into a separate plan that has the same substantive plan terms as the defined contribution MEP. We estimate that in a given year, a spinoff-termination for an unresponsive participating employer will be made with respect to 20 percent of all defined contribution MEPs (926 defined contribution MEPs therefore will be subject to this requirement). We also estimate that the burden associated with the requirement to create a spinoff plan will be 10 hours. Therefore, the total burden is estimated to be 9,260 hours (926 defined contribution MEPs times 10).

#### 4. Notice of Spinoff-Termination, §1.413-2(g)(7)(i)(A)

A section 413(c) plan administrator implementing a spinoff-termination pursuant to §1.413-2(g)(7) must provide notification of the spinoff-termination to participants who are employees of the unresponsive employer. This notice requirement is in §1.413-2(g)(7)(i)(A). We estimate that in a given year, 20 percent of all defined contribution MEPs (926 defined contribution MEPs) will implement a spinoff-termination of an unresponsive participating employer, and notice to participants will need to be provided with respect to those spinoff-terminations.

Using the same numbers as the estimates for notice requirements under §1.413-2(g)(4), we estimate that for a defined contribution MEP that uses the exception to the unified plan rule, approximately 50 notices of a spinoff-termination will need to be sent to participants who are employees of the unresponsive participating employer (and their beneficiaries). We also estimate that the total burden for this requirement is five hours. Based on this number, we estimate that the burden of preparing and distributing the notices will be 4,630 hours (926 defined contribution MEPs times five hours).

5. Reporting Spinoff or Spinoff-Termination to IRS, §§1.413-2(g)(6)(ii) and (g)(7)(iv)

Any spinoff or spinoff-termination from a defined contribution MEP under the proposed regulations must be reported to the IRS (in accordance with forms, instructions, and other guidance). Because the IRS anticipates issuing a new form or revising an existing form for this purpose, the estimated reporting burden associated with proposed §§1.413-2(g)(6)(ii) and (g)(7)(iv) will be reflected in the reporting burden associated with those forms, and therefore is not included here.

Comments on the collection of information should be sent to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP; Washington, DC 20224. Comments on the collection of information should be received by **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collections of information may be minimized, including through the application of automated collection

techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

Estimated total average annual recordkeeping burden: 25,304 hours.

Estimated average annual burden per response: Between 7 and 27 hours.

Estimated number of recordkeepers: 926 to 3,704.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

### III. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) (RFA) imposes certain requirements with respect to federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 et seq.) and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a proposal is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to present an initial regulatory flexibility analysis (IRFA) of the proposed rule. The Treasury Department and the IRS have not determined whether the proposed rule, when finalized, will likely have a significant economic impact on a

substantial number of small entities. The determination of whether creating an exception to the unified plan rule for defined contribution MEPs will have a significant economic impact requires further study. However, because there is a possibility of significant economic impact on a substantial number of small entities, an IRFA is provided in these proposed regulations. The Treasury Department and the IRS invite comments on both the number of entities affected and the economic impact on small entities.

Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel of Advocacy of the Small Business Administration for comment on its impact on small business.

#### 1. Need for and Objectives of the Rule

As discussed earlier in this preamble, under the unified plan rule, the failure of one employer participating in a MEP to satisfy a qualification requirement or to provide information needed to determine compliance with a qualification requirement puts the tax-favored status of the entire MEP at risk. By creating an exception to the unified plan rule, the proposed rule would ensure that, in certain circumstances, compliant participating employers will continue to maintain a qualified plan. Offering a workplace retirement plan is a valuable tool for small businesses in recruiting and retaining employees. By retaining tax-favored status in a defined contribution MEP, participating employers will continue to be able to offer a workplace retirement plan for their employees.

The proposed rule is expected to encourage the establishment of new defined contribution MEPs, as well as increase the participation of employers in existing defined

contribution MEPs, in accordance with Executive Order 13847 and the policy of expanding workplace retirement plan coverage. MEPs are an efficient way to reduce costs and complexity associated with establishing and maintaining defined contribution plans, which could encourage more plan formation and broader availability of more affordable workplace retirement savings plans, especially among small employers and certain working owners. Thus, the Treasury Department and the IRS intend and expect that the proposed rule would deliver benefits primarily to the employees of many small businesses and their families, as well as, many small businesses themselves.

## 2. Affected Small Entities

The Small Business Administration estimates in its 2018 Small Business Profile that 99.9 percent of United States businesses meet its definition of a small business.<sup>25</sup> The applicability of these proposed regulations does not depend on the size of the business, as defined by the Small Business Administration. The Treasury Department and the IRS expect that the smallest businesses, those with less than 50 employees, are most likely to benefit from the savings derived from retaining tax-favored status in a defined contribution MEP, as well as increasing participation in defined contribution MEPs, which are expected to occur as a result of the proposed rule. In Section 7 of the Regulatory Impact Analysis, see Table 1, which provides statistics on retirement plan coverage by the size of the employer. These same types of employers, which are disproportionately small businesses, are more likely to participate in a workplace

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<sup>25</sup> The Small Business Administration, Office of Advocacy, 2018 Small Business Profile. <https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-US.pdf>. Last accessed 03/28/2019. For purposes of the 2018 Small Business Profile, small businesses are defined as firms employing fewer than 500 employees.



retirement plan after the proposed rule is finalized. The proposed rule will also affect small entities that participate in MEPs at the time the rule is finalized.

### 3. Impact of the Rule

Under the existing unified plan rule, a MEP may be disqualified due to the actions of one unresponsive participating employer. Upon disqualification, employers participating in a MEP and their employees would lose the tax benefits of participating in a qualified retirement plan (deduction for contributions, exclusion of investment returns, and deferred income recognition for employees). By creating an exception to the unified plan rule, the proposed regulation would allow a defined contribution MEP to remain qualified and thereby retain tax-favored benefits for participating employers and their employees. For example, if a defined contribution MEP that would have otherwise been disqualified satisfies the conditions for the exception to the unified plan rule, small entities that participate in the MEP will be able to continue to make contributions to the defined contribution MEP that are deductible under section 404(a)(3).

In addition, as previously stated in the Special Analysis section of this preamble, this proposed rule could potentially result in an expansion of defined contribution MEPs, which could create a more affordable option for retirement savings coverage for many small businesses, thereby potentially yielding economic benefits for participating employers and their employees. Some advantages of a workplace retirement plan (including 401(k) plans, SEP-IRAs, and SIMPLE IRAs) over IRA-based savings options outside the workplace include: (1) higher contribution limits; (2) potentially lower investment management fees, especially in larger plans; (3) a well-established uniform regulatory structure with important consumer protections, including qualification

requirements relating to protected benefits, vesting, disclosures, and spousal protections; (4) automatic enrollment; and (5) stronger protections from creditors. At the same time, workplace retirement plans provide employers with choice among plan features and the flexibility to tailor retirement plans that meet their business and employment needs.

The ERISA recordkeeping and reporting requirements could decrease for some small employers that would have maintained a single-employer defined contribution plan but instead join a defined contribution MEP. This includes costs associated with filing Form 5500 and fulfilling audit requirements to the extent a MEP is considered a single plan under ERISA. Thus, one Form 5500 and audit report would satisfy the reporting requirements, and each participating employer would not need to file its own, separate Form 5500 and, for large plans or those few small plans that do not meet the small plan audit waiver, an audit report.

The cost savings of an employer participating in a defined contribution MEP may be partially offset by the costs of complying with the conditions for the exception to the unified plan rule, including new recordkeeping and reporting requirements. Additional costs from these actions will be incurred by the section 413(c) plan administrator, who among other things is tasked with adopting plan language (§1.413-2(g)(3)(i)(B)), providing notice concerning a participating employer failure to unresponsive participating employers, participants, beneficiaries, and the Department of Labor (§1.413-2(g)(4)), notifying participants and beneficiaries of a spinoff-termination (§1.413-2(g)(7)(ii)), and implementing a spinoff of the MEP assets related to an unresponsive participating employer and creating a spun-off plan document (§1.413-

2(g)(7)(i)). Although the Treasury Department and the IRS do not have sufficient data to determine precisely the likely extent of the increased costs of compliance, the estimated burden of complying with the recordkeeping and reporting requirements are described in the Paperwork Reduction Act section of the preamble. While the burdens associated with the recordkeeping and reporting requirements are imposed on the defined contribution MEP and not the participating employers, those additional costs may be directly passed on to participating employers.

Another partial offset to the cost savings is the potential for an unresponsive participating employer to have its participation in a MEP terminated as a result of the MEP's compliance with these proposed regulations. The proposed regulations state that if an unresponsive participating employer fails to take appropriate remedial action to correct a qualification failure, one of the following actions must occur in order for the MEP to meet the conditions for the exception to the unified plan rule: (a) a spinoff initiated by the unresponsive participating employer and implemented by the section 413(c) plan administrator or (b) a spinoff-termination pursuant to plan terms. The Treasury Department and the IRS anticipate that compared to the number of small entities that will benefit from these proposed rules, relatively few employers will have their plans spun-off or spun-off and terminated.

As previously stated in the Regulatory Impact Analysis of this preamble, the Treasury Department and the IRS considered alternatives to the proposed regulations. One of the conditions that a defined contribution MEP must satisfy in order to be eligible for the exception to the unified plan rule is that the section 413(c) plan administrator provides notice and an opportunity for the unresponsive participating employer to take

action with respect to the participating employer failure. The proposed regulations would require that the section 413(c) plan administrator provide up to three notices to the unresponsive participating employer, informing the employer (and in some cases, participants and the Department of Labor) of the participating employer failure and the consequences for failing to take remedial action or initiate a spinoff from the defined contribution MEP. After each notice is provided, the unresponsive participating employer has 90 days to take appropriate remedial action or initiate a spinoff from the defined contribution MEP. For more information about the notice requirements, see Section II.B of the Explanation of Provisions in this preamble.

In addition to the alternatives discussed in the Regulatory Impact Analysis of this preamble, the Treasury Department and the IRS considered whether the proposed regulations should reduce the number of notices or the timing between providing notices in order for a section 413(c) plan administrator to satisfy this condition for the exception to the unified plan rule. The notice and accompanying timing requirements were provided for because the notice procedures are intended to ensure that an unresponsive participating employer and its employees are aware of the adverse consequences if the employer neither takes appropriate remedial action nor initiates a spinoff, and the timing requirements are intended to give the unresponsive participating employer sufficient time to take that remedial action or initiate a spinoff. The Treasury Department and the IRS believe that, given the adverse consequences of a spinoff-termination to plan participants, the notice and accompanying timing requirements strike a balance between providing protection for unresponsive participating employers and their employees and not unduly burdening the section 413(c) plan administrators in

defined contribution MEPs. In the Comments and Requests for Public Hearing section of the preamble, commenters are asked to address whether the regulations should add mechanisms to avoid the potential for repetitive notices, as well as whether additional procedures should be added to facilitate the resolution of disputes between a section 413(c) plan administrator and an unresponsive participating employer.

#### 4. Duplicate, Overlapping, or Relevant Federal Rules

The proposed rule would not conflict with any relevant federal rules. As discussed above, the proposed rule would merely create an exception to the unified plan rule for defined contribution MEPs.

#### **Comments and Requests for Public Hearing**

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the Treasury Department and the IRS as prescribed in this preamble under the “**ADDRESSES**” heading. The Treasury Department and the IRS request comments on all aspects of the proposed rules. Comments specifically are requested on the following topics:

- The circumstances, if any, in which the exception to the unified plan rule should be available to defined benefit plans (taking into account issues arising from the minimum funding requirements and spinoff rules for defined benefit plans, including the treatment in such a spinoff of any plan underfunding or overfunding).
- Whether the regulations should include additional requirements for MEPs to be eligible for the exception to the unified plan rule, including additional procedures to facilitate the resolution of disputes between a section 413(c)

plan administrator and an unresponsive participating employer.

- Whether the regulations should add appropriate mechanisms to avoid the potential for repetitive notices or to shorten the notice period for a potential qualification failure that becomes a known qualification failure. Those mechanisms might include, for example, treating the first notice that the section 413(c) plan administrator provided in connection with the potential qualification failure as satisfying the requirement to provide the first notice in connection with the known qualification failure, with appropriate modification of the second and third notices.
- For purposes 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.
- What additional guidance should be provided on terminating a plan in the case of a spinoff-termination. This might include, for example, rules that are similar to the relief provided in section 4, Q&A-1, of Rev. Proc. 2003-86, 2003-2 C.B. 1211, that any other plan maintained by an unresponsive participating employer will not be treated as an alternative plan under §1.401(k)-1(d)(4)(i) for purposes of the ability to make distributions upon termination of the spun-off plan. It might also address the §1.411(a)-11(e)(1) rules for distributions upon plan termination
- Whether there are any studies that would help to quantify the impact of the

proposed regulations.

Also, consistent with the Executive Order, comments are specifically requested on any steps that the Secretary of Labor should take to facilitate the implementation of these proposed regulations. The Department of Labor has informed the Treasury Department and the IRS that a section 413(c) plan administrator implementing a spinoff-termination may have concerns about its fiduciary responsibility both to the MEP and to the spun-off plan, as well as potential prohibited transaction issues. Commenters are encouraged to provide feedback on these issues and address the need for additional interpretive guidance or prohibited transaction exemptions from the Department of Labor to facilitate the implementation of these regulations.<sup>26</sup> Copies of comments on these topics will be forwarded to the Department of Labor.

All comments will be available for public inspection and copying at [www.regulations.gov](http://www.regulations.gov) or upon request. A public hearing will be scheduled if requested in writing by any person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place of the public hearing will be published in the **Federal Register**.

### **Drafting Information**

The principal authors of these regulations are Jamie Dvoretzky and Pamela Kinard, Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes (EEE)). However, other personnel from the IRS and the Treasury Department participated in the development of these regulations.

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<sup>26</sup> For an example of this type of interpretative guidance and a related prohibited transaction exemption in the context of a terminating abandoned plan, see 29 CFR 2578.1 (establishing procedures for qualified termination administrators to terminate abandoned plans and distribute benefits with limited liability under title I of ERISA) and Prohibited Transaction Exemption 2006-06 (71 FR 20856, Apr. 21, 2006).

## List of Subjects in 26 CFR Part 1

Income taxes, reporting and recordkeeping requirements.

### Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

#### PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part:

Authority: 26 U.S.C. 7805 \* \* \*

Par. 2. Section 1.413-2 is amended by:

1. Removing paragraph (a)(3)(iv).
2. Adding and reserving paragraphs (e) and (f).
3. Adding paragraph (g).

The additions read as follows:

§1.413-2 Special rules for plans maintained by more than one employer.

\* \* \* \* \*

(e) [Reserved]

(f) [Reserved]

(g) Qualification of a section 413(c) plan--(1) General rule. Except as provided in paragraph (g)(2) of this section, the qualification of a section 413(c) plan under section 401(a) or 403(a), taking into account the rules of section 413(c) and this section, is determined with respect to all participating employers. Consequently, the failure by one participating employer (or by the plan itself) to satisfy an applicable qualification requirement will result in the disqualification of the section 413(c) plan for all participating employers.



(2) Exception to general rule for participating employer failures--(i) In general. A section 413(c) plan that is a defined contribution plan will not be disqualified on account of a participating employer failure, provided that the following conditions are satisfied--

(A) The section 413(c) plan satisfies the eligibility requirements of paragraph (g)(3) of this section;

(B) The section 413(c) plan administrator satisfies the notice requirements described in paragraph (g)(4) of this section;

(C) If the unresponsive participating employer fails to take appropriate remedial action with respect to the participating employer failure, as described in paragraph (g)(5)(ii) of this section, the section 413(c) plan administrator implements a spinoff described in paragraph (g)(2)(ii) of this section; and

(D) The section 413(c) plan administrator complies with any information request that the IRS or a representative of the spun-off plan makes in connection with an IRS examination of the spun-off plan, including any information request related to the participation of the unresponsive participating employer in the section 413(c) plan for years prior to the spinoff.

(ii) Spinoff. A spinoff is described in this paragraph (g)(2)(ii) if it satisfies either of the following requirements--

(A) The spinoff is initiated by the unresponsive participating employer, as described in paragraph (g)(5)(iii) of this section, and implemented by the section 413(c) plan administrator, as described in paragraph (g)(6)(ii) of this section; or

(B) The spinoff is a spinoff-termination pursuant to plan terms, as described in paragraph (g)(7) of this section.

(iii) Definitions. The following definitions apply for purposes of this paragraph (g):

(A) Employee. An employee is a current or former employee of a participating employer.

(B) Known qualification failure. A known qualification failure is 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. For purposes of this paragraph (g)(2)(iii)(B), an unresponsive participating employer includes any employer that is treated as a single employer with that unresponsive participating employer under section 414(b), (c), (m), or (o)).

(C) Participating employer. A participating employer is one of the employers maintaining a section 413(c) plan.

(D) Participating employer failure. A participating employer failure is a known qualification failure or a potential qualification failure.

(E) Potential qualification failure. A potential qualification failure is 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. For purposes of this paragraph (g)(2)(iii)(E), an unresponsive participating employer includes any employer that is treated as a single employer with that unresponsive participating employer under section 414(b), (c), (m), or (o)).

(F) Section 413(c) plan administrator. A section 413(c) plan administrator is the plan administrator of a section 413(c) plan, determined under the rules of section 414(g).

(G) Unresponsive participating employer. An unresponsive participating employer is a participating employer in a section 413(c) plan that fails to comply with reasonable and timely requests from the section 413(c) plan administrator for information needed to determine compliance with a qualification requirement or fails to comply with reasonable and timely requests from the section 413(c) plan administrator to take actions that are needed to correct a failure to satisfy a qualification requirement as it relates to the participating employer.

(3) Eligibility for exception to general rule--(i) In general. To be eligible for the exception described in paragraph (g)(2) of this section, a section 413(c) plan must satisfy the following requirements--

(A) Practices and procedures. The section 413(c) plan administrator has established practices and procedures (formal or informal) that are reasonably designed to promote and facilitate overall compliance with applicable Code requirements, including procedures for obtaining information from participating employers.

(B) Plan language. The section 413(c) plan document describes the procedures that would be followed to address participating employer failures, including the procedures that the section 413(c) plan administrator would follow if the unresponsive participating employer does not take appropriate remedial action or initiate a spinoff pursuant to paragraph (g)(5) of this section.

(C) Not under examination. At the time the first notice described in paragraph (g)(4)(i) of this section is provided to the unresponsive participating employer, the section 413(c) plan is not under examination under the rules of paragraph (g)(3)(ii) of this section.

(ii) Under examination. For purposes of this section, a plan is under examination if--

(A) The plan is under an Employee Plans examination (that is, an examination of a Form 5500 series or other examination by the Employee Plans Office of the Tax Exempt and Government Entities Division of the IRS (Employee Plans) (or any successor IRS office that has jurisdiction over qualified retirement plans));

(B) The plan is under investigation by the Criminal Investigation Division of the IRS (or its successor); or

(C) The plan is treated as under an Employee Plans examination under the rules of paragraph (g)(3)(iii) of this section.

(iii) Certain plans treated as under an Employee Plans examination--(A) Notification of pending examination. For purposes of this section, a plan is treated as under an Employee Plans examination if the section 413(c) plan administrator, or an authorized representative, has received verbal or written notification from Employee Plans of an impending Employee Plans examination, or of an impending referral for an Employee Plans examination. A plan is also treated as under an Employee Plans examination if it has been under an Employee Plans examination and the plan has an appeal pending with the IRS Office of Appeals (or its successor), or is in litigation with the IRS, regarding issues raised in an Employee Plans examination.

(B) Pending determination letter application--(1) Possible failures identified by IRS. For purposes of this section, a section 413(c) plan is treated as under an Employee Plans examination if a Form 5300, "Application for Determination for Employee Benefit Plan," Form 5307, "Application for Determination for Adopters of Modified Volume Submitter Plans," or Form 5310, "Application for Determination for Terminating Plan" (or any successor form for one or more of these forms) has been submitted with respect to the plan and the IRS agent notifies the applicant of possible qualification failures, whether or not the applicant is officially notified of an examination. This includes a case in which, for example, a determination letter on plan termination had been submitted with respect to the plan, and an IRS agent notifies the applicant that there are partial termination concerns. In addition, if, during the review process, the IRS agent requests additional information that indicates the existence of a failure not previously identified by the applicant, then the plan is treated as under an Employee Plans examination (even if the determination letter application is subsequently withdrawn).

(2) Failures identified by determination letter applicant. For purposes of paragraph (g)(3)(iii)(B)(1) of this section, an IRS agent is not treated as notifying a determination letter applicant of a possible qualification failure if the applicant (or the authorized representative) has identified the failure, in writing, to the reviewing IRS agent before the agent recognizes the existence of the failure or addresses the failure in communications with the applicant. For purposes of this paragraph (g)(3)(iii)(B)(2), submission of a determination letter application does not constitute an identification of a failure to the IRS.

(C) Aggregated plans. For purposes of this section, a plan is treated as under an Employee Plans examination if it is aggregated for purposes of satisfying the nondiscrimination requirements of section 401(a)(4), the minimum participation requirements of section 401(a)(26), the minimum coverage requirements of section 410(b), or the requirements of section 403(b)(12)(A)(i), with any plan that is under an Employee Plans examination. In addition, a plan is treated as under an Employee Plans examination with respect to a failure of a qualification requirement (other than those described in the preceding sentence) if the plan is aggregated with another plan for purposes of satisfying that qualification requirement (for example, section 401(a)(30), 415, or 416) and that other plan is under an Employee Plans examination. For purposes of this paragraph (g)(3)(iii)(C), the term aggregation does not include consideration of benefits provided by various plans for purposes of the average benefits test set forth in section 410(b)(2).

(4) Notice requirements. The section 413(c) plan administrator satisfies the notice requirements with respect to a participating employer failure if it satisfies the requirements of this paragraph (g)(4).

(i) First notice. The section 413(c) plan administrator must provide notice to the unresponsive participating employer describing the participating employer failure, the remedial actions the employer would need to take to remedy the failure, and the employer's option to initiate a spinoff of plan assets and account balances attributable to participants who are employees of that employer. In addition, the notice must explain the consequences under plan terms if the unresponsive participating employer neither takes appropriate remedial action with respect to the participating employer failure nor

initiates a spinoff, including the possibility that a spinoff of assets and account balances attributable to participants who are employees of that employer would occur, followed by a termination of that plan.

(ii) Second notice. If, by the end of the 90-day period following the date the first notice described in paragraph (g)(4)(i) of this section is provided, the unresponsive participating employer neither takes appropriate remedial action with respect to the participating employer failure nor initiates a spinoff, then the section 413(c) plan administrator must provide a second notice to the employer. The second notice must be provided no later than 30 days after the expiration of the 90-day period described in the preceding sentence. The second notice must include the information required to be included in the first notice and must also specify that if, within 90 days following the date the second notice is provided, the employer neither takes appropriate remedial action with respect to the participating employer failure nor initiates a spinoff, a notice describing the participating employer failure and the consequences of not correcting that failure will be provided to participants who are employees of the unresponsive participating employer (and their beneficiaries) and to the Department of Labor.

(iii) Third notice. If, by the end of the 90-day period following the date the second notice described in paragraph (g)(4)(ii) of this section is provided, the unresponsive participating employer neither takes appropriate remedial action with respect to the participating employer failure nor initiates a spinoff, then the section 413(c) plan administrator must provide a third notice to that employer. The third notice must be provided no later than 30 days after the expiration of the 90-day period described in the preceding sentence. Within this time period, the third notice must also be provided to

participants who are employees of that employer (and their beneficiaries) and to the Office of Enforcement of the Employee Benefits Security Administration in the Department of Labor (or its successor office). The third notice must include the information required to be included in the first notice, the deadline for employer action, and an explanation of any adverse consequences to participants in the event that a spinoff-termination occurs, and state that the notice is being provided to participants who are employees of the unresponsive participating employer (and their beneficiaries) and to the Department of Labor.

(5) Actions by unresponsive participating employer--(i) In general. An unresponsive participating employer takes appropriate remedial action with respect to a participating employer failure for purposes of paragraph (g)(2)(i)(C) of this section if it satisfies the requirements of paragraph (g)(5)(ii) of this section. Alternatively, an unresponsive participating employer initiates a spinoff with respect to a participating employer failure for purposes of paragraph (g)(2)(ii)(A) of this section if the employer satisfies the requirements of paragraph (g)(5)(iii) of this section. The final deadline for an unresponsive participating employer to take one of these actions is 90 days after the third notice is provided. See paragraph (g)(7) of this section for the consequences of the employer's failure to meet this deadline.

(ii) Appropriate remedial action--(A) Appropriate remedial action with respect to potential qualification failure. An unresponsive participating employer takes appropriate remedial action with respect to a potential qualification failure if the employer provides data, documents, or any other information necessary for the section 413(c) plan administrator to determine whether a qualification failure exists. If the unresponsive



participating employer provides this information, the section 413(c) plan administrator determines that, based on this information, a qualification failure exists that is attributable solely to that employer, and the participating employer fails to comply with reasonable and timely requests from the section 413(c) plan administrator to take actions that are needed to correct that qualification failure, then the qualification failure becomes a known qualification failure. In that case, the section 413(c) plan will be eligible for the exception in paragraph (g)(2) of this section with respect to the known qualification failure by satisfying the conditions set forth in paragraph (g)(2) of this section with respect to that known qualification failure, taking into account the rules of paragraph (g)(6)(i) of this section.

(B) Appropriate remedial action with respect to known qualification failure. An unresponsive participating employer takes appropriate remedial action with respect to a known qualification failure if the employer takes action, such as making corrective contributions, that corrects, or enables the section 413(c) plan administrator to correct, the known qualification failure.

(iii) Employer-initiated spinoff. An unresponsive participating employer initiates a spinoff pursuant to this paragraph (g)(5)(iii) if, after receiving a notice described in paragraph (g)(4) of this section, the employer directs the section 413(c) plan administrator to spin off plan assets and account balances held on behalf of its employees to a separate single-employer plan established and maintained by that employer in a manner consistent with plan terms.

(6) Actions by section 413(c) plan administrator--(i) Rules for a potential qualification failure that becomes a known qualification failure. For purposes of applying

paragraph (g)(2) of this section to a potential qualification failure that becomes a known qualification failure, actions taken (including notices provided) when the failure was a potential qualification failure are not taken into account. For example, a notice that the section 413(c) plan administrator provided in connection with the potential qualification failure would not satisfy the notice requirements for the known qualification failure. However, in determining whether the section 413(c) plan is under examination, as described in paragraph (g)(3)(iii) of this section, as of the date of the first notice describing the known qualification failure, the section 413(c) plan administrator will be treated as providing that notice on the date the first notice was provided with respect to the related potential qualification failure, but only if the following conditions are satisfied--

(A) After determining that a qualification failure exists, the section 413(c) plan administrator makes a reasonable and timely request to the participating employer to take actions that are needed to correct the failure, and

(B) As soon as reasonably practicable after the participating employer fails to respond to that request, the section 413(c) plan administrator provides the first notice described in paragraph (g)(4)(i) of this section with respect to the known qualification failure.

(ii) Implementing employer-initiated spinoff. If an unresponsive participating employer initiates a spinoff pursuant to paragraph (g)(5)(iii) of this section by directing the section 413(c) plan administrator to spin off the assets and account balances held on behalf of its employees to a separate single-employer plan established and maintained by the employer, the section 413(c) plan administrator must implement and

complete a spinoff of the assets and account balances held on behalf of the employees of the employer that are attributable to their employment by the employer within 180 days of the date on which the unresponsive participating employer initiates the spinoff. The section 413(c) plan administrator must report the spinoff to the IRS (in the manner prescribed by the IRS in forms, instructions, and other guidance).

(7) Spinoff-termination--(i) Spinoff. If the unresponsive participating employer neither takes appropriate remedial action described in paragraph (g)(5)(ii) of this section nor initiates a spinoff pursuant to paragraph (g)(5)(iii) of this section, then, in accordance with plan language, the section 413(c) plan administrator must take the following steps as soon as reasonably practicable after the deadline described in paragraph (g)(5)(i) of this section--

(A) Send notification of spinoff-termination to participants who are employees of the unresponsive participating employer (and their beneficiaries) as described in paragraph (g)(7)(iii) of this section.

(B) Stop accepting contributions from the unresponsive participating employer;

(C) Implement a spinoff, in accordance with the transfer requirements of section 414(l) and the anti-cutback requirements of section 411(d)(6), of the plan assets and account balances held on behalf of employees of the unresponsive participating employer that are attributable to their employment by that employer to a separate single-employer plan and trust that has the same plan administrator, trustee, and substantive plan terms as the section 413(c) plan; and

(D) Terminate the spun-off plan and distribute assets of the spun-off plan to plan participants (and their beneficiaries) as soon as reasonably practicable after the plan termination date.

(ii) Termination of spun-off plan. In terminating the spun-off plan, the section 413(c) plan administrator must--

(A) Reasonably determine whether, and to what extent, the survivor annuity requirements of sections 401(a)(11) and 417 apply to any benefit payable under the plan and take reasonable steps to comply with those requirements (if applicable);

(B) Provide each participant and beneficiary with a nonforfeitable right to his or her accrued benefits as of the date of plan termination, subject to income, expenses, gains, and losses between that date and the date of distribution; and

(C) Notify the participants and beneficiaries of their rights under section 402(f).

(iii) Contents of the notification of spinoff-termination. For the notice required to be provided in paragraph (g)(7)(i)(A), the section 413(c) plan administrator must provide information relating to the spinoff-termination to participants who are employees of the unresponsive participating employer (and their beneficiaries), including the following--

(A) Identification of the section 413(c) plan and contact information for the section 413(c) plan administrator;

(B) The effective date of the spinoff-termination;

(C) A statement that no more contributions will be made to the section 413(c) plan;

(D) A statement that as soon as practicable after the spinoff-termination, participants and beneficiaries will receive a distribution from the spun-off plan; and

(E) A statement that before the distribution occurs, participants and beneficiaries will receive additional information about their options with respect to that distribution.

(iv) Reporting spinoff-termination. The section 413(c) plan administrator must report a spinoff-termination pursuant to this paragraph (g)(7) to the IRS (in the manner prescribed by the IRS in forms, instructions, and other guidance).

(8) Other rules--(i) Form of notices. Any notice provided pursuant to paragraph (g)(4) or (g)(7)(i)(A) of this section may be provided in writing or in electronic form. For notices provided to participants and beneficiaries, see generally §1.401(a)-21 for rules permitting the use of electronic media to provide applicable notices to recipients with respect to retirement plans.

(ii) Qualification of spun-off plan--(A) In general. In the case of any plan that is spun off in accordance with paragraph (g)(6)(ii) or (g)(7) of this section, any participating employer failure that would have affected the qualification of the section 413(c) plan, but for the application of the exception set forth in paragraph (g)(2) of this section, will be a qualification failure with respect to the spun-off plan.

(B) Favorable tax treatment upon termination. Notwithstanding paragraph (g)(8)(ii)(A) of this section, distributions made from a spun-off plan that is terminated in accordance with paragraph (g)(7) of this section will not, solely because of the participating employer failure, fail to be eligible for favorable tax treatment accorded to distributions from qualified plans (including that the distributions will be treated as eligible rollover distributions under section 402(c)(4)), except as provided in paragraph (g)(8)(ii)(C) of this section.

(C) Exception for responsible parties. The IRS reserves the right to pursue appropriate remedies under the Code against any party (such as the owner of the participating employer) who is responsible for the participating employer failure. The IRS may pursue appropriate remedies against a responsible party even in the party's capacity as a participant or beneficiary under the spun-off plan that is terminated in accordance with paragraph (g)(7) of this section (such as by not treating a plan distribution made to the responsible party as an eligible rollover distribution).

(iii) Additional guidance. The Commissioner may provide additional guidance in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin, or in forms and instructions, that the Commissioner determines to be necessary or appropriate with respect to the requirements of this paragraph (g).

(9) Applicability date. This paragraph (g) applies on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register.**

Kirsten Wielobob

Deputy Commissioner for Services and Enforcement.

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