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December 21, 2018

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
US Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: *RIN 1210-AB88; Definition of “Employer” Under Section 3(5) of ERISA—Association Retirement Plans and Other Multiple Employer Plans*

Dear Sir or Madam:

The Investment Company Institute¹ is pleased to submit comments on the Department of Labor’s (the Department’s) proposed regulation to expand access to multiple employer plans (MEPs). The proposal would clarify the circumstances under which an employer can join a MEP through either a group or association of employers or a professional employer organization (PEO). The Institute supports expanding access to MEPs, particularly for small employers, and our comments recommend that the Department go further than the proposal by permitting participation in “open” MEPs sponsored by financial services firms.

As explained below, expanding access to MEPs could significantly increase retirement plan coverage and retirement savings adequacy. Without modification, however, the proposal is unlikely to have a meaningful impact on coverage. We urge the Department to interpret the definition of employer more

¹ The [Investment Company Institute](http://www.ici.org) (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI’s members manage total assets of US\$21.5 trillion in the United States, serving more than 100 million US shareholders, and US\$7.0 trillion in assets in other jurisdictions. ICI carries out its international work through [ICI Global](http://www.ici.org/global), with offices in London, Hong Kong, and Washington, DC.

broadly, specifically by expanding the category of persons able to act indirectly in the interest of employers, within the meaning of section 3(5) of ERISA. Such an interpretation would be within the Department's statutory authority and would be consistent with the Department's interpretations with respect to PEO- and state-sponsored MEPs. Any concerns the Department may have with respect to permitting MEP sponsorship by financial services firms can be mitigated by using established methods for ensuring both the legitimacy and qualifications of the MEP sponsor and protection from conflicts of interest. Failure to expand the interpretation as recommended likely will result in market distortions and inefficiencies, to the detriment of retirement savers.

Set forth below is a detailed explanation of our comments. After a discussion of the benefits of expanded use of MEPs in Section I and an overview of the proposal in Section II, Section III explains why permitting financial services firms to sponsor open MEPs is critical to accomplishing the proposal's intended purpose. In particular, our letter provides support for the Department's broad authority to construe the meaning of "employer" under ERISA, explains why our recommended interpretation would be consistent with other Department positions, illustrates that financial services firms offer unique qualifications that make them ideal candidates to sponsor MEPs, and describes why the proposal as currently drafted is unlikely to have a significant impact on coverage.

I. Expanded Use of MEPs Would Provide Significant Benefits

In the proposal, the Department explains that "[e]xpanding access to workplace retirement plans is critical to helping more American workers financially prepare to retire." We strongly agree, particularly with respect to workers at small businesses (those with fewer than 100 employees)—the employer segment most in need of solutions to encourage retirement plan sponsorship.²

Small businesses often face particular challenges in establishing and maintaining retirement plans. Studies have found that concern about administrative costs and burdens are a significant reason that more small businesses do not offer retirement plans. Small employers maintaining their own plan are required to prepare their own plan documents, summary plan descriptions and other participant disclosures, file individual Form 5500s, obtain a separate financial audit, and establish a single trust. Because of the fixed administrative costs of sponsoring a plan, small plans may not qualify for lower-cost investment options or lower recordkeeping fees. In addition to administrative and compliance burdens, smaller employers may be challenged by the fiduciary responsibility and liability of selecting and monitoring service providers and plan investment options.

² According to the National Compensation Survey (March 2018), 55 percent of workers at employers with fewer than 100 workers are covered by a pension plan (DB, DC, or both), while 86 percent of workers at employers with 100 workers or more are covered by a pension plan (DB, DC, or both). The survey is available at: www.bls.gov/ncs/ebs/benefits/2018/ownership/civilian/table02a.htm. For a discussion of how pension coverage varies by plan size, see Brady and Bogdan, "Who Gets Retirement Plans and Why, 2013," *ICI Research Perspective* 20, no. 6 (October 2014), available at www.ici.org/pdf/per20-06.pdf.

By joining a MEP, many small employers could band together to offer their employees access to a 401(k) plan. These plans would spare smaller employers from shouldering all the administrative costs associated with setting up and maintaining a 401(k) plan and give small plans banding together the leverage of a larger asset base to reduce investment fees for their participants. They may even encourage some small employers to offer plans because doing so would be easier (for example, the MEP provider could handle preparation and maintenance of plan documents, participant notices and disclosures, annual report filing and audit requirements on behalf of the group, rather than each employer doing these things on its own). Fiduciary responsibility for selecting and monitoring investment options and other service providers could be allocated to the MEP sponsor as well.

But the Department's guidance to date has precluded unrelated employers from pooling assets and participants under a single plan.³ The proposal would continue to prevent the use of truly open MEPs by carrying on the "group or association" requirement, with the limited exception of PEO-sponsored plans. In our view, the limited availability of MEPs under the proposed rule will do little to expand coverage or improve retirement security. We urge the Department to reconsider its interpretation of the definition of "employer" under ERISA section 3(5) so that otherwise unrelated employers can participate in MEPs sponsored by well-regulated financial services firms acting in the interest of the participating employers.

II. Overview of Proposal

The proposal would explain, and somewhat expand, the circumstances under which a group or association of employers or a PEO can constitute an "employer" under section 3(5) of ERISA for purposes of establishing and maintaining an individual account "employee pension benefit plan" under section 3(2) of ERISA. The proposal also would permit certain working owners without employees to participate in a MEP sponsored by a group or association. Under the proposal, a "bona fide group or association of employers" and a "bona fide professional employer organization" would be deemed to be able to act in the interest of an employer under section 3(5), and thereby sponsor a defined contribution MEP, by satisfying certain enumerated criteria.

The criteria for a "bona fide group or association of employers" to exist include requirements such as having:

- at least one substantial business purpose unrelated to offering and providing MEP coverage,
- a formal organizational structure,
- control of the plan and other activities of the group, and
- a commonality of interest in terms of either a common trade, industry, or line of business or geographic commonality limited to being in the same state or metropolitan area.

³ See, e.g., DOL Advisory Opinions 2012-03A and 2012-04A (guidance analyzing when an entity may establish a single ERISA plan that covers multiple employers). Most of the guidance addresses associations, but some addresses other types of organizations (e.g., financial institutions, franchises, employee leasing and professional service organizations).

The proposal specifically excludes from a “bona fide group or association of employers” a group or association that is formed by a bank or trust company, insurance issuer, broker-dealer, or other similar financial services firm (except to the extent that such an entity participates in the group or association in its capacity as an employer member of the group or association).

The criteria for a “bona fide professional employer organization”⁴ to exist include, among other things, that the organization:

- performs “substantial employment functions” on behalf of its client employers, and maintains adequate records relating to such functions, and
- has substantial control over the functions and activities of the MEP, as the plan sponsor, the plan administrator, and a named fiduciary.

The criteria relevant to whether a PEO performs substantial employment functions on behalf of its client employers include the PEO being responsible for (among other things): payment of wages; reporting and withholding federal employment taxes; recruiting, hiring and firing; determining employee compensation; providing workers’ compensation coverage; certain integral human resources functions; and certain regulatory compliance functions. The proposal states that the presence of a single criterion alone may, depending on the facts and circumstances of the particular situation and the particular criterion, be sufficient to satisfy the “substantial employment functions” requirement.⁵

III. Permitting Financial Services Firms to Sponsor Open MEPs Is Critical to Accomplishing the Proposal’s Purpose

The Department must reconsider the proposal’s narrow interpretation of who can act in the interest of an employer in sponsoring a plan if the regulation is to meet its intended purpose of expanding access to workplace retirement plans. Under such a reconsideration, the Department should permit financial services firms to act in the interest of otherwise unrelated employers in sponsoring a MEP.

A. The Department has broad authority to construe the meaning of “employer”

The definition of employer under section 3(5) of ERISA does not compel the Department’s narrow interpretation that only a bona fide group or association of employers or a bona fide PEO can act in the interest of employers in sponsoring a plan. An “employer” under section 3(5) includes “*any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity*”

⁴ A professional employer organization (PEO) is described as a human-resource company that contractually assumes certain employer responsibilities of its client employers.

⁵ The proposal also provides a safe harbor under which a PEO shall be considered to perform substantial employment functions on behalf of its client employers if the organization meets any five or more of the enumerated criteria. In addition, certain “certified professional employer organizations” (CPEOs) as defined in section 7705(a) of the Internal Revenue Code could also meet a separate safe harbor for the “substantial employment functions” requirement.

(emphasis added). The definition by its terms *includes* a group or association of employers, but is *not limited to* a group or association of employers. In addition, the language “*any person* acting . . . indirectly in the interest of an employer” (emphasis added) could be interpreted much more broadly than the Department has indicated.

In the proposal, the Department permits a PEO to sponsor a MEP by acting in the interest of its client employers. We assert that financial services firms that offer retirement plans can similarly act in the interest of client employers. PEOs and financial services firms that are retirement plan providers are both for-profit enterprises. While PEOs may typically offer additional services to its clients, the proposal states that the presence of a single substantial employment function performed by the PEO on behalf of client employers could alone be sufficient to satisfy the substantial employment function requirement. This renders arbitrary the proposal’s focus on PEOs to the exclusion of other retirement plan providers.⁶

The offering and maintenance of a retirement plan arguably is a substantial employment function that can be performed by enterprises other than PEOs. This is particularly true of a financial services firm acting as the MEP’s plan administrator and named fiduciary. These are meaningful roles with significant responsibilities and liabilities otherwise assumed by the employer sponsor in a single employer plan.

More broadly, service providers and individuals act and perform employer-type functions on behalf of employers regularly in significant ways, with such duties and responsibilities established by contract. The search for extrinsic evidence relating to whether an entity is more or less like the “real” employer (in the criteria for when a PEO can sponsor a MEP) is irrelevant. PEOs are no more qualified to serve as MEP sponsors than other firms simply because they perform payroll functions. Like financial services firms, PEOs are business enterprises that are otherwise unaffiliated with the employer clients that hire them to perform a service or multiple services related to employment and benefits. A PEO in this context has no inherent representational interest with respect to the client that is distinguishable from a financial services firm hired by an employer to establish and maintain a retirement plan.

B. The Department’s narrow interpretation cannot be reconciled with its prior interpretations regarding state-run MEPs

In Interpretive Bulletin 2015-02 (the “IB”), the Department took a much broader view of who can act in the interest of an employer under section 3(5) of ERISA, expressing the view that a state could sponsor a MEP that is essentially an “open” MEP. The IB asserts that “a state has a unique representational interest in the health and welfare of its citizens that connects it to the in-state employers that choose to participate in the state MEP and their employees, such that the state should be considered to act indirectly in the interest of the participating employers.”⁷ While this type of

⁶ In the context of MEPs sponsored by a group or association of employers, DOL’s requirement that there be at least one other substantial business purpose of the group (aside from providing retirement benefits) also seems arbitrary.

⁷ 80 Fed. Reg. 71939 (November 18, 2015).

“unique representational interest” may distinguish a state from business enterprises that provide retirement plan services, it represents a fairly broad interpretation of the statutory language relating to acting in the interest of employers—for only one type of sponsor that arguably does not warrant such special treatment—and unjustifiably creates an unfair competitive advantage for states wanting to enter an otherwise private-sector marketplace.

Beyond this “unique representational interest,” we question whether the special treatment conferred on states for purposes of sponsoring open MEPs is justified. As we noted in our January 2016 comment letter relating to the IB,⁸ the IB appears to make unsupported assumptions about a state’s qualifications, expertise, and ability to operate free of conflicts in offering private-sector retirement solutions. Moreover, in the context of a MEP, where the full range of ERISA fiduciary obligations would apply to the MEP sponsor, we see no justification for treating a would-be state MEP sponsor differently from a would-be private-sector open MEP sponsor. Both would be subject to the same consequences in the case of fiduciary breach, although in the case of a state sponsor, the Department acknowledges that state sovereign immunity laws “would have to be evaluated carefully to ensure they do not conflict with ERISA’s remedial provisions.”⁹ This recognition alone suggests that the Department is not fully confident in its decision to single out states for special treatment and there does not appear to be any justifiable reason for permitting only states to sponsor open MEPs.

If the proposal is not expanded to permit financial services firms to sponsor open MEPs, the competitive advantage provided to states through the IB guidance could have serious consequences. At best, excluding private-sector retirement providers from the open MEP market could lead to market distortion and inefficiencies. In the worst case, government options potentially could supplant the vibrant private-sector market for retirement plan products and services. A robust competitive marketplace is crucial to the success of our retirement system, by promoting innovation, better service, and reduced costs. Providing such advantages to government options is likely to result in loss of the flexibility and innovation that characterize the current private retirement system.

As an aside, unrelated to the proposal in question, we note that the Department’s position as expressed in the IB—that a state acts in the interest of employers in sponsoring a MEP—directly contradicts the positions of several states that sponsor auto-IRA programs for private-sector workers.¹⁰ These states take the position that their auto-IRA programs are not covered by ERISA because they are not sponsored by any actual employer and because they are “voluntary” for employees within the meaning of the

⁸ See Letter from David W. Blass to Office of Regulations and Interpretations, January 19, 2016; available at https://www.ici.org/pdf/16_ici_dol_state_retirement_comment.pdf.

⁹ 80 Fed. Reg. 71940, footnote 17.

¹⁰ For example, Oregon, California, Illinois, Connecticut, and Maryland have enacted and are implementing laws to establish mandatory state-run automatic IRA programs for private-sector employees in the respective states. These states assert that the programs are not covered or preempted by ERISA.

Department's payroll-deduction IRA safe-harbor.¹¹ Contrary to this assertion, we believe that if a state can act in the interest of employers in sponsoring a 401(k) MEP, there is no reason why the state should not also be considered to act in the interest of employers in sponsoring an automatic-enrollment payroll deduction IRA program. Pursuant to Interpretive Bulletin 99-1, employer-established payroll deduction IRAs with automatic enrollment are not "completely voluntary," as required by the safe harbor, and therefore would be covered by ERISA. Where a state acts in the interest of employers to set up such an auto-enrollment IRA program (which, in the private sector, clearly would be covered by ERISA), the program—and importantly, the participating individuals—likewise should be covered by the protections of ERISA. We note that implementing legislation in many of the states provides that the programs shall not be implemented if found to be covered by ERISA. Furthermore, in light of the mandatory nature of these state programs, we believe they are preempted by ERISA—another area disputed by the states. The current lack of Department guidance with respect to the status of these IRA programs is having major ramifications as states continue to implement their programs and additional states consider legislation to establish state-run auto-IRA programs. The Department should take swift action to clear up these significant misinterpretations of the applicable law and guidance.

C. Financial services firms offer unique qualifications that make them ideal candidates to serve as MEP sponsors

The Department's narrow proposal fails to recognize the unique qualifications and expertise held by financial services firms in the retirement savings area. Financial institutions have the expertise necessary to establish and maintain a retirement plan. In this regard, it is crucial that a MEP sponsor understand the laws and regulations applicable to retirement plans and be prepared to act in accordance with those principles. Financial services firms, and particularly mutual fund companies, are well acquainted with—and used to acting in accordance with—fiduciary principles.¹²

If the Department determines to expand the proposal as recommended here, we expect that the Department would want to establish criteria or parameters for determining which financial services firms would be permitted to sponsor a MEP. There are various options for how to define this universe. One approach would be to permit trustees or issuers of individual retirement plans within the meaning of section 7701(a)(37) of the Internal Revenue Code to sponsor MEPs.¹³ Indeed, the Department has

¹¹ See DOL Interpretive Bulletin 99-1; 29 CFR §2509.99-1.

¹² All investment advisers to registered investment companies, such as mutual funds, must be registered with the SEC under the Investment Advisers Act of 1940.

¹³ Qualified IRA trustees and issuers include banks, credit unions, or trust companies, or entities that are licensed and regulated by the IRS as a "non-bank" trustee or custodian. Non-bank trustees and custodians are described under Treasury Regulation section 1.408-2(e). For example, a prospective non-bank trustee or custodian must file an application demonstrating that it will meet certain regulatory requirements including that it has the ability to act within accepted rules of fiduciary conduct (demonstrating business continuity, an established location, fiduciary experience, fiduciary procedures,

relied on this construct in the context of its Abandoned Plan Program. The Department's Abandoned Plan regulation permits qualified IRA trustees to act as Qualified Termination Administrators (QTAs), which essentially allows a financial institution to assume sponsorship of an abandoned plan for purposes of winding down and terminating operation of the plan.¹⁴ As noted by the Department, "[i]n developing its criteria for QTAs, the Department limited QTA status to trustees or issuers of an individual retirement plan within the meaning of section 7701(a)(37) of the Code because the standards applicable to such trustees and issuers are well understood by the regulated community and the Department is unaware of any problems attributable to weaknesses in the existing Code and regulatory standards for such persons."¹⁵ Applying this approach in the context of MEP sponsorship would allow the Department to expand the availability of MEPs, while relying on established regulatory safeguards.

Another approach for consideration would be to restrict the universe of financial services firms to the types of licensed and regulated financial services providers described in the exception for "transactions with independent fiduciaries with financial expertise" under the Department's 2016 final rule defining the term fiduciary under section 3(21) of ERISA.¹⁶ Although subsequently vacated, this rule provided an exception from fiduciary status for advice to a fiduciary of a plan or IRA, with respect to an arm's length transaction, where the plan/IRA fiduciary is (in relevant part):

- (A) A bank as defined in section 202 of the Investment Advisers Act of 1940 or similar institution that is regulated and supervised and subject to periodic examination by a State or Federal agency;
- (B) An insurance carrier which is qualified under the laws of more than one state to perform the services of managing, acquiring or disposing of assets of a plan;
- (C) An investment adviser registered under the Investment Advisers Act of 1940 or, if not registered as an investment adviser under the Investment Advisers Act by reason of paragraph (1) of section 203A of such Act, is registered as an investment adviser under the laws of the State (referred to in such paragraph (1)) in which it maintains its principal office and place of business; or
- (D) A broker-dealer registered under the Securities Exchange Act of 1934.

and financial responsibility); the capacity to account for the interests of a large number of individuals; and the fitness to handle retirement funds. In addition, the IRA custodian must allow for regulatory oversight and audits.

¹⁴ 29 CFR §2578.1

¹⁵ 71 Fed. Reg. 20821 (April 21, 2006).

¹⁶ 29 CFR §2510.3-21(c)(1)

In the context of MEPs, it would be reasonable for the Department to similarly conclude that these licensed and regulated financial services firms would have the requisite sophistication, fiduciary capacity, and other qualifications to undertake sponsorship of a plan on behalf of adopting employers.

We understand that, aside from the issue of qualifications and expertise, the Department may have concerns about potential conflicts of interest for financial services firms acting in the capacity of a MEP sponsor. In this respect, it may be necessary to provide new prohibited transaction relief, with appropriate protective conditions, to address these concerns. But the need for prohibited transaction relief and conflict of interest safeguards should not be a barrier to expanding the availability of MEPs. ICI would welcome the opportunity to work with the Department to develop appropriate conditions that will foster a robust competitive marketplace for MEPs.

Finally, although the Department may be hesitant to depart substantially from the Association Health Plan (AHP) regulation finalized in June 2018, we believe there is good reason to distinguish retirement plans.¹⁷ The AHP rule similarly defined the term “employer” under section 3(5) of ERISA for purposes of offering multiple employer health benefit plans to employees, including criteria similar to the retirement plan proposal for the existence of a “bona fide group or association” of employers. Those criteria included conditions requiring the group or association to have at least one substantial business purpose unrelated to providing health insurance coverage (or other benefits) and prohibiting health insurance issuers from constituting a bona fide group or association. The concerns historically expressed by the Department, however, with respect to multiple employer welfare arrangements (concerns related to the potential for fraud, abuse, mismanagement, and underfunding) would be less likely to arise in the context of a defined contribution retirement plan—the assets of which are fully funded, held in trust (typically by an institutional trustee), and invested in regulated investment funds. This is particularly true if qualified MEP sponsors are defined by reference to an established legal framework, such as IRA trustees and issuers, or licensed and regulated financial services firms, as discussed above. As the Department already has departed from the AHP rule in the proposal at issue—by proposing to allow PEO-sponsored retirement MEPs—we believe the Department could likewise justify allowing open MEPs sponsored by financial services firms in the retirement plan context.

D. Without changes, the proposal will have little impact on coverage

Without expansion of the proposal as we have recommended herein, the proposal is unlikely to significantly expand retirement plan coverage. As explained above, the proposal excludes a significant and qualified segment of the potential universe of MEP sponsors by prohibiting financial services firms from sponsoring open MEPs, which will negatively impact the health and vibrancy of the marketplace for MEPs. In addition, many small employers and self-employed/non-traditional workers will be left

¹⁷ 83 Fed. Reg. 28912 (June 21, 2018).

without access to the MEP structure because they either are not part of a bona fide group or association of employers or do not contract with a PEO for services.

This access problem likely will be most acute for self-employed individuals, independent contractors, “gig” workers, and the like, since PEO plans by definition will not be an option, and these workers may be less likely to belong to a bona fide group or association as defined by the proposal. Financial institutions are in a unique position to make a difference for this segment of the workforce by offering a practical means to gather individuals into a MEP structure, with higher contribution rates than IRA-based plans. In excluding financial services firms, the proposal will not fully realize the promise and potential of MEPs.

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The Institute appreciates the opportunity to comment on the proposed rule. We support the Department’s efforts to expand availability of MEPs in the retirement plan space and urge the Department to go further, well within its authority under ERISA, to permit financial services firms to sponsor open MEPs. Such an expansion would have the potential to significantly increase coverage under workplace retirement plans and improve overall retirement savings adequacy.

If you have any questions about our comment letter, please feel free to contact David Abbey (202-326-5920 or david.abbey@ici.org) or Elena Barone Chism (202-326-5821 or elena.chism@ici.org).

Sincerely,

/s/ David Abbey

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