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Open MEPs and Other Issues Under Section 3(5) of the Employee Retirement Income Security Act

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Submitter Information

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General Comment

Good afternoon. The DOL should definitely NOT allow Open MEPs. Attached is an article that I wrote, entitled "The Case Against Open MEPs," which details the many issues that would arise for plan sponsors and participants, and provides alternative options to increase access and participation. I would be happy to discuss any or all of these issues with you more fully. Thank you.

Sincerely,
Todd E. Heller, Esq., CPC

Attachments

THE CASE AGAINST OPEN MEPs

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There are many issues to consider before allowing Open MEPs, including many compliance and plan-asset issues. At the same time, Open MEPs would be subject to far less oversight than single-employer plans. This combination could have catastrophic results for plan sponsors and participants. There are several alternatives to increase employee access to retirement savings through employer-sponsored plans without creating these issues. This summary provides some of the major Open MEP issues, as well as better options to increase plan access and participation.

Compliance Issues

Several compliance issues will arise from allowing Open MEPs, including:

Document Issues – While having one base plan document may simplify the document-maintenance process (i.e., required plan restatements and amendments), adopting entities will have to complete their own adoption agreement, either on their own or with professional assistance. Given the desire to maintain low fees, many will elect to complete this process on their own. As these are legal documents, there is a very high probability that these documents will not be properly completed. Moreover, as much of the administrative responsibility of ensuring that the plan terms are followed will fall on each adopting entity, there will be a substantial increase in failures to comply with plan document terms. Some examples include not following plan eligibility, entry and contribution requirements, loan terms, distribution/withdrawal timing, etc.

Compliance Testing – Each adopting entity would need to perform its own compliance testing (i.e., coverage, nondiscrimination, minimum participation, top heavy, etc.). This testing is critical to ensure that enough employees are covered and that they benefit at adequate levels. In many cases, either the plan sponsor will be unaware of these requirements or will not properly run the testing.

Related Entities/Leased Employees: Each adopting entity would be required to analyze related entity (i.e., controlled group and affiliated service group) relationships, as well as any leased employee or common law employee reclassification issues. It is extremely likely that they won't understand these technical rules and won't consider/cover entities that should be included in the testing group. They will also fail to consider leased employees.

Contribution Calculations - Having adopting entities be responsible for the calculation and timing of plan contributions will result in many errors, some of which can take the plan out of compliance, and create "plan asset" issues.

Distribution Eligibility Verification/Processing – Each adopting entity would be responsible for determining whether a participant is eligible to receive a plan distribution, which would depend on the manner in which it completed the adoption agreement. It will also be responsible for ensuring that the distribution is processed

properly, including obtaining any required spousal consent. In many cases, leaving these determinations to those entities will result in participants receiving distribution before permitted by law or the plan document.

Plan Asset Issues/Conflicts of Interest

Open MEPs will create plan asset and conflict of interest issues:

Float Lending – Many bundled providers purposely delay the remittance of elective deferral contributions to participant accounts so that they may loan on the “float.” This practice is a direct violation of the “plan asset” rules. There is very little doubt that all Open MEPs will participate in this practice. If the plan asset rules created by Congress are to have any relevance, the DOL must do what it can to stop this practice which clearly violates the plan asset rules and not allow additional abuses.

Lack of Independent Administration – It’s very likely that any administration of Open MEPs will be performed by firms that are affiliated with financial institutions. This will very likely lead to conflicts of interest, where the parties providing investment and administration services won’t be able to provide objective advice to the plans. It should also be noted that plan administration and compliance services are not commodities like insurance policies or other investments. Such services are highly technical and are akin to legal or accounting services. Open MEPs would transfer much of these services from professionals at Third Party Administration (“TPA”) firms to bundled platforms that dedicate very little resources to compliance. Encouraging plan sponsors to move away from TPA firms who specialize in these services is a huge mistake. It’s like encouraging corporations to use online tax preparation software to prepare and file their corporate tax returns, which would be disastrous!

Lack of Oversight

Open MEPs will be subject to far less oversight:

No Accountant Audit – Open MEPs will substantially reduce the number of CPA audits of plans. While they will audit Open MEPs that are “large plan” filers, they will only be auditing the plan at large and not each adopter of the Open MEP. As an example, the auditors will not be reviewing the compliance testing and deposit timing for each adopter of the plan. This will result in a much higher risk of the compliance issues noted above to be unchecked.

Minimal IRS/DOL Review – It’s also very likely that the IRS and DOL will review a lower percentage of employers that adopt Open MEPs. This is the case with Closed MEPs, as well as SIMPLE IRA Plans. This lack of review will further add to the Open MEP compliance issues. This lack of accountability will further serve to increase compliance issues, as well as potential bad actors.

Termination – Successor Plan Issues

When an adopting entity of a MEP wants to leave the MEP, that adopter will need to ensure that they don't allow participants to receive distributions from the MEP, but rather force trustee-to-trustee transfers. Otherwise, the adopter won't be able to adopt another plan for at least 12 months following the date of the last plan distribution from the MEP. It's very likely that MEP adopters won't understand these requirements and will violate the "successor plan" rules by allowing distributions from the MEP and then adopting a new plan within 12 months thereafter. Even if they do comply with the successor plan rules, employees would lose access for one or two plan years to comply with the successor plan rules (i.e., in direct conflict with the intention of allowing Open MEPs), unless they trustee-to-trustee transfer the MEP assets to a new plan, which will be very unlikely for many adopters.

Potential Challenges

The consolidation of plans into fewer plans with much higher asset values, coupled with the increased compliance and plan asset issues, as well as the lack of oversight, will make Open MEPs huge targets of litigation. Much of the expected savings will have to be used to defend these cases and to pay resulting claims.

Given all of these issues, it is necessary to review the objectives for allowing Open MEPs, as well as the motives behind the proponents of such arrangements. The main objective is the promotion of access to employer-sponsored plans. However, a closer look at SIMPLE IRA Plans makes one wonder whether Open MEPs would be any better. SIMPLE IRA Plans exist to provide low-cost employer-sponsored retirement plans with minimal employer responsibilities. They have even fewer compliance requirements than proposed Open MEPs would have. However, if SIMPLE IRA Plans have worked, there wouldn't be a need to explore ways to increase access. If they haven't worked to fill the access gap, why would MEPs, with added layers of compliance requirements, work any better?

Open MEPs will likely appeal to smaller businesses rather than larger companies with the internal resources to dedicate to administration. The most vocal proponents of Open MEPs are large insurance companies and the financial services industry that are looking for ways to build "horizontal monopolies." They don't have the best interests of plan sponsors at heart. They're looking for ways to solidify relationships and build revenue, while trying to allocate the least amount of resources to proper plan design and administration. This is in direct conflict with the supposed objectives of Open MEPs.

Better Options

Following are options to consider to increase plan access and participation in lieu of Open MEPS:

Increase Plan Installation Credits – Federal tax credits for employers who implement new plans or add terms to existing plan that increase participation (e.g., automatic enrollment, matching contributions, etc.), would result in better access and higher participation.

Mandate Plan Sponsorship – If the goal is access for 100 percent of all employees, why not mandate sponsorship for all employers?

Automatic Enrollment – As many studies have concluded, requiring or encouraging automatic enrollment provisions will substantially increase participation rates.

Allow Pooling of Assets Without Common Plan – Plans could be allowed to pool investments through a common trust, which would reduce recordkeeping and investment costs for participants, but not at the expense of proper plan administration and compliance.

While the first three options would require an act of Congress, the DOL could consider implementing the last alternative through regulation.

Conclusion

There are better ways to achieve the stated objectives of increasing access to employer-sponsored retirement savings. Open MEPs will only serve to substantially increase compliance, plan asset, and other issues, while at the same time being subject to lower oversight and more conflicts of interest...a terrible combination!

We have provided third party administration services to qualified plans for over 45 years and would be happy to discuss these issues with you further. Feel free to contact me:

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