October 25, 2019

Submitted Electronically

The Honorable Preston Rutledge
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: "Open" MEP RFI – 1210-AB92

Dear Assistant Secretary Rutledge:

We write on behalf of a sponsor of an existing multiple employer plan ("MEP") to provide comments to the Department of Labor (the "Department") in response to the Request for Information (84 Fed. Reg. 37545 (July 31, 2019), the "RFI") regarding "open" MEPs (*i.e.*, single defined contribution retirement plans in which multiple unrelated employers participate) and other issues under section 3(5) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

As a preliminary matter, we appreciate the Department's recognition that MEPs play an important role in providing retirement security to many workers and retirees. Associations have sponsored defined benefit and defined contribution "closed" MEPs for decades, and have a proven track record of providing cost-efficient retirement benefits. These associations utilize the MEP structure to professionalize plan administration and achieve economies of scale for their members. That is particularly beneficial to small businesses who often find offering a retirement plan challenging. Moreover, associations are accountable to, and under the control of, their members, which helps improve MEP governance and operation.

Many well-established, *bona fide* association-sponsored MEPs have members whose membership purpose extends beyond the provision of benefits, a characteristic which satisfies the requirement of prior Departmental guidance. *See, e.g.,* Advisory Opinion 2012-04A (May 25, 2012) (explaining that there was "no employment based common nexus or other genuine organizational relationship that is unrelated to the provision of benefits"). These associations, and the MEPs they sponsor, are distinguishable from those organizations where membership is principally if not solely for the purpose of providing benefits.

The Department has gone to great lengths to expand the availability of MEPs. In particular, the Department recently finalized rules for Association Retirement Plans ("ARPs") intended to facilitate broader adoption. 29 C.F.R. § 2510.3-55. Those rules, largely based on decades of guidance from the Department, set standards and requirements for the *bona fide* groups or associations of employers eligible to sponsor ARPs and loosen certain restrictions on employer participation. The Department now seeks additional information to determine whether to further expand the availability of MEPs through new regulations.

If the Department decides to issue new regulations to facilitate open MEPs, the rules should not apply to ARPs and other closed MEPs. Many existing ARPs either already meet the requirements to qualify as *bona fide* groups or associations (*e.g.*, the governance, membership, control, and relationship requirements) or have taken substantial steps to do so. It would be counter-productive to existing ARPs, and the goals ARPs are intended to achieve, if the Department were to impose new requirements on ARPs through a new open MEP regulation.

We strongly agree with the Department that trade associations should continue to be permitted to sponsor MEPs. In the ARP regulation preamble, the regulation itself, and the RFI, the Department clearly states that *bona fide* associations of employers are specifically permitted to sponsor ARPs. To encourage participation in open MEPs, the Department should not impose requirements on open MEP sponsors that could prohibit associations, in form or in substance, from allowing non-members to participate in either existing ARPs or new MEPs run by an organization that sponsors an existing ARP. Instead, the Department should maintain, at the very least, a level playing field that permits sponsorship by associations that have experience running MEPs.

We caution the Department against issuing checklists or other subregulatory guidance that could have unintended consequences on existing MEPs. The Department recently signaled its intention to potentially provide a checklist or similar guidance to assist small employers in discharging their fiduciary duties with respect to MEPs. 84 Fed. Reg. 37508, 37523 (July 31, 2019). Specifically, the Department stated it would review and possibly update its compliance guide entitled "Tips for Selecting and Monitoring Service Providers for your Employee Benefit Plan" (the "Tip Sheet"). *Id.* Although the Tip Sheet has been beneficial to many plan sponsors, it is important that the Department take care not to intentionally or unintentionally create new obligations for MEP sponsors and participating employers through subregulatory guidance.

For example, one commenter suggested that the Department establish a "fiduciary checklist" specifying criteria for evaluating an employer's decision to participate in a MEP. The commenter asked the Department to encourage or require employers to, among other things, consider at least three plans, examine how long the plan has been in existence, review how many other employers and employees are actively enrolled, and receive and review a report on plan operations and periodically assess employee satisfaction and complaints at least annually.

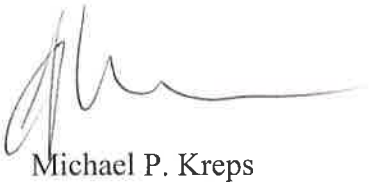
If adopted, such criteria would create a formulaic approach to an employer's decision to participate in a MEP that may not comport with current best practices. The Tip Sheet currently avoids taking such an approach, and that has been beneficial to employers. To do otherwise could have the unintended consequence of limiting the steps employers take when selecting a MEP, imposing material new costs on employers, and/or impeding the development of new best practices.

We are particularly concerned about the commenter's suggestions because the issuance of subregulatory guidance would not be subject to an open and transparent notice and comment process under the Administrative Procedures Act. The notice and comment process is critically important. It allows industry experts, consumer advocates, and other stakeholders to provide the

Department with the benefit of their expertise with respect to policy, legal, and operational issues. That is why courts have often been skeptical of subregulatory guidance. *See, e.g., Air Transport Ass'n of America v. F.A.A.*, 291 F.3d 49, 55 (D.C. Cir. 2002)(an agency may not label a substantive change to a rule an interpretation to avoid the notice and comment requirements). A recent Executive Order and Department of Justice guidelines similarly caution agencies from making substantive changes to rules through subregulatory guidance. Executive Order 13891 (October 9, 2019); Department of Justice, Memorandum for all Components from the Attorney General (Nov. 16, 2017).

We appreciate the opportunity to provide comments in response to the RFI. Please do not hesitate to contact us for additional information.

Sincerely,



Michael P. Kreps