October 29, 2019

Department of Labor
200 Constitution Avenue
Washington, DC 20210

RE: 1210-AB92 "Open MEPs" and Other Issues Under Section 3(5) of ERISA

Dear Sir or Madam:

Thank you for this opportunity to provide comments on behalf of Empower Retirement to your Request for Information (RFI) regarding the definition of employer in section 3(5) of the Employee Retirement Income Security Act of 1974 (ERISA) and the possible amendment of Department of Labor (DOL) regulations to facilitate open multiple employer plans (open MEPs). Empower serves more than 38,000 retirement plans and 9.2 million participants, including many MEPs. Our clients range from start-up plans to plans with over 200,000 participants, and we are very engaged in the small employer plan market, where use of open MEPs would be most common. Based on our experience, we believe expansion of MEP opportunities will increase access to employer-based retirement savings plans among small employers and we support the DOL's efforts to consider such expansion.

DOL's longstanding position was that there had to exist some commonality of interest among the employers participating in a MEP. This generally required that the employers are in the same trade, industry, line of business or profession. In July of 2019, DOL issued a final rule regarding Definition of ''Employer'' Under Section 3(5) of ERISA — Association Retirement Plans and Other Multiple-Employer Plans.[1] While the final regulation provided for some expansion of the commonality requirement, it specifically excluded most retirement service providers from serving as MEP sponsors.[2]

We believe that allowing retirement service providers to sponsor true open MEPs would encourage more small employers to offer workplace savings arrangements to their employees. In October of 2018, the Empower Institute,[3] a division of Empower

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[1] 29 CFR 2510.3-55
[2] 29 CFR 2510.3-55(b)(1)(vii)
[3] Formed in March 2015, the Empower Institute aims to critically examine investment theories, retirement strategies and assumptions. It suggests theories and changes for achieving better outcomes for employers, institutions, financial advisors and individual investors. The institute's mission is bringing together industry insights and expertise to address the personal finance issues and retirement savings challenges Americans face today.

Retirement, conducted a survey of small business decision makers. Key findings included:

- Sixty-six percent of small businesses who do not offer a retirement plan today are likely to consider an open MEP. A similar percent of those with a plan today are likely to consider switching to an open MEP.
- Those interested in an open MEP are interested in potential lower costs to the organization and fees to employees, variety of plans and fund options and lower fiduciary risk.
- MEP prospects are most likely to consider an open MEP offered by a retirement provider and are least likely to consider one offered by the government.
- Not only are retirement plan providers most considered, but they are also most trusted to provide an open MEP.
- The largest inhibitors to offering a retirement plan include cost, size of business, lack of expertise and current business conditions.
- The key advantages to offering a plan (those who offer a plan today) are doing the right thing, employee retention and attracting talent.[4]

As noted in the RFI, some ambiguity exists around the definition of "employer" for purposes of who may sponsor an employee benefit plan. Section 3(5) of ERISA defines employer as: "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."[5] While a number of the terms in section 3(5) are not further defined, this should not require DOL to take an overly restrictive interpretation in their guidance. The language of the statute clearly anticipated allowing parties other than an employer to act on behalf of the employer in sponsoring an employee benefit plan.

As is rightly noted in the RFI, the DOL has broad authority to craft regulations under section 505 of ERISA: "This section provides, in relevant part, that 'the Secretary may prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this subchapter.' This authority extends to situations where, as here, the text of ERISA section 3(5) is ambiguous on its face."[6] We would urge DOL to use this authority to expand the availability of open MEPs by eliminating the commonality and control requirements and allowing retirement service providers to sponsor, maintain and administer MEPs.

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[4] Empower Retirement Small Business Open-Multiple Employer (MEP) research, conducted by Harris Insights and Analytics on behalf of Empower; 304 small business decision makers completed an online survey in October 2018.
[5] ERISA §3(5)
[6] 84 Fed Reg 37546 (July 31, 2019)

Request for Information

Section II of the RFI contains a number of questions regarding MEPs. We will be focusing our attention on the questions in part A of Section II.

1. *Should the Department amend 29 CFR 2510.3–55 to expressly permit financial institutions or other persons to maintain a single defined contribution retirement plan on behalf of multiple unrelated employers (hereinafter ‘‘open MEP’’)?*

We firmly believe that the commercial entities specifically excluded in the DOL’s final Association Retirement Plan rules are the retirement service providers that are most qualified to sponsor and administer MEPs. One of the perceived benefits of MEPs is alleviating the administrative burdens on the participating employers, particularly small employers. Many retirement service providers, such as Empower, have committed significant resources to creating state of the art recordkeeping system, hiring and training staff to work with employers and plan participants, and developing and implementing programs that encourage retirement savings and help workers understand and meet their retirement goals.

Retirement service providers currently perform many of the day-to-day tasks associated with maintaining a retirement plan. These tasks include providing recordkeeping services, preparing and distributing plan and participant level tax reporting, generation and distribution of required participant notices, compliance testing under section 401(a) of the Internal Revenue Code, processing plan distributions, implementing participant enrollment and contribution elections, implementing participant investment elections, and administration of plan participant loan programs and hardship withdrawals to name but a few.

Many in the consultant and advisor community also work closely with employers in the administration of retirement plans. These entities, often working in tandem with the retirement plan provider, will assist employers in plan design, selection of investment offerings, selecting service providers, monitoring investments and service providers, and designing participant communication programs. All of the activities listed above would typically be the responsibility of the employer, but instead the employer has selected service providers to act on their behalf in administering the plan.

There appears to be no valid policy argument for excluding a Commercial Entity(ies) (as that term is defined in the RFI) such as retirement service providers from meeting the definition of acting directly or indirectly in the interest of an employer while allowing another Commercial Entity, professional employer organizations (PEOs), to meet this requirement. The rationale for allowing PEOs to meet the definition under section 3(5) seems to center on their performance of many employer-related functions that have nothing to do with the maintenance and administration of a defined contribution plan. The goal should be to encourage and allow those providers with the most expertise in plan administration to develop and market MEP offerings. This would help ensure a vibrant and competitive marketplace.

2. *What type of person or persons should be recognized as capable of being an ''employer'' under the ''indirectly in the interest'' clause in section 3(5) of ERISA for purposes of establishing and maintaining an open MEP?*

As noted above, section 3(5) of ERISA provides the applicable definition: "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan." The key element appears to be taking on responsibilities typically assumed by the employer with respect to administering the employee benefit plan. The language of the statute does not focus on a specific type of entity. We believe this flexibility would allow for the MEP marketplace to evolve and meet the needs of the employers.

Cleary, it is the interest of both service providers and clients they serve to ensure MEP sponsors have the capabilities to properly administer the plan and that they are acting in the best interests of the participating employers. Much of this concern can be addressed by the nature of a MEP arrangement. As sponsor to the MEP, the service provider would be a named fiduciary subject to the prudence standards and prohibited transaction rules under ERISA.

In addition, DOL could exercise additional oversight on MEP sponsors. As noted in the preamble to the final rule regarding Association Retirement Plans, Congress has taken an interest in promoting MEPs. In May of this year, the House of Representatives passed the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE) by an overwhelming majority. A key component of SECURE is providing for open MEPs and allowing financial organizations to serve as plan sponsors. While SECURE has not yet passed the Senate, its provisions could offer some guidance on how DOL might monitor service providers sponsoring MEPs.

SECURE would require that MEP sponsors register with DOL, acknowledge fiduciary status and ensure that all relevant parties meet their bonding requirements. SECURE would also allow DOL to perform audits, examinations and investigations as deemed necessary. DOL could consider adopting similar requirements in order to fulfill its obligation to protect the interests of plan participants in these arrangements.

3. *If a Commercial Entity could sponsor an open MEP, what conflicts of interest, if any, would the Commercial Entity, affiliates and related parties likely have with respect to the plan and its participants? How could these or other such conflicts of interest be appropriately mitigated?*

As we stated above, we believe commercial entities, particularly those entities that already provide retirement plan services, present the greatest opportunity to expand the retirement plan coverage gap through open MEP sponsorship. All commercial entities will have conflicts of interest acting in the role of employer as they will be providing services to plans and plan participants in a fiduciary capacity and will be compensated for those services. The DOL should rely on the strength of its fiduciary and prohibited transaction rules and its ability to implement new rules to deal with unique concerns presented by different types of commercial entities rather than favor one type of entity over another.

For commercial entities (including related parties and affiliates) to enter the market and sponsor open MEPs, there must be an expectation for the Commercial Entity to charge fees for services it provides to the MEP to cover its costs but also allow it to earn a reasonable profit comparable to the fees it charges and other compensation earned related to other similarly situated single-employer plans. Commercial entities today typically provide services, including for example recordkeeping, administration, investment management, and trust and custodial services to single-employer retirement plans as covered service providers under ERISA. The relationship between the plan fiduciary and the non-fiduciary service provider is considered a prohibited party-in-interest transaction as defined in section 406(a) of ERISA. However, ERISA contains statutory prohibited transaction exemptions under section 408. Service providers are able to receive compensation in this party-in-interest transaction using ERISA section 408(b)(2). Non-fiduciary service providers have therefore provided services to plan fiduciaries and received reasonable compensation using the 408(b)(2) prohibited transaction exemption, including the extensive service and compensation disclosure regime described in the 408(b)(2) regulations. This regime has proved to be very successful in allowing otherwise conflicted party-in-interest service providers to disclose compensation for services provided to an ERISA-covered plan to the plan fiduciary. The plan fiduciary can then determine whether to enter into or extend the service arrangement and determine whether the total cost is reasonable based on the services provided.

However, we believe the 408(b)(2) regime provides limited prohibited transaction exemption relief in certain instances where the Commercial Entity offers proprietary products. Based on market demand from plan fiduciaries and their advisers, service providers often bundle proprietary products and services to retirement plans as part of its total service offering. According to a Cerulli Associates DC Plan Recordkeeper Survey, only 24% of plans in their survey did not offer proprietary investments in their plan lineups.[7] Revenue tied directly to those products and services will often provide expense efficiencies for plan recordkeeping services. In many cases, revenue associated with these products and services can dramatically reduce direct recordkeeping fees that the plan fiduciary has determined should be charged to participants. This pricing arrangement is often used in the smaller plan space. Those plans will contract with service providers not only for recordkeeping services but investment products like group annuity contracts, collective investment trusts or mutual funds. Plan sponsors will also contract to provide managed account services to

[7] 2018 Cerulli Associates/SPARK Institute DC Recordkeeper Survey.

participants. These products and services can be offered by the Commercial Entity itself or one of its affiliates.

In situations where the Commercial Entity also serves as an open MEP provider, it is acting as a plan fiduciary. The offering of these products and services would presumably create a conflict of interest with the plan and participants. While the Commercial Entity, in its fiduciary capacity, may determine the offering of a proprietary product or service would ultimately benefit plan and participants, there is either unworkable, unclear or nonexistent prohibited transaction exemptions to allow a Commercial Entity to receive compensation in connection with these product offerings. We believe section 408(b)(8) of ERISA would clearly allow a Commercial Entity to offer collective investment trusts and 408(b)(2) would provide relief for managed account arrangement. However, DOL should address prohibited transaction exemption relief for proprietary general account group annuity products and mutual funds in a balanced way that allows a Commercial Entity to offer proprietary products but also protects participants from potential harm arising from potential conflicts of interests. The inability to offer these proprietary products will create a significant impediment for commercial entities to enter the open MEP market.

These issues and potential opportunities for additional clarity are highlighted below.

- Group Annuity General Account Products: Establish a Prohibited Transaction Exemption

Many plans, particularly smaller plans, will either exclusively offer all or some portion of plan investments through group annuity contracts. Group annuities can provide variable annuity and other separate account insurance investments but also beneficial general account stable value vehicles. The stable value products provide participants a safe investment in periods of market volatility and a guarantee of principal. Often the credited interest rate exceeds the guaranteed minimum rate of the product, making these products very competitive to collective investment trust stable value and money market funds.

Based on our experience, these insurance company general account products represent very popular and important products for plan sponsors and participants.

We do not believe there is an existing prohibited transaction exemption that would allow an open MEP sponsor, acting as investment manager under ERISA Section 3(38), to retain compensation associated with general account group annuity contracts. Therefore, we strongly recommend the DOL engage with the industry in discussions about a workable prohibited transaction exemption to allow insurance company commercial entities operating as open MEP sponsors to offer proprietary general account products.

- Mutual Funds: Modify Existing PTE 77-4 to incorporate a deemed consent process

Commercial entities can also offer mutual funds. In this case, we believe prohibited transaction exemption 77-4 would be available to an open MEP sponsor. However, modifications to it are essential to ease the administrative burden currently found in its requirements. Section II(e) establishes that an independent fiduciary approves the "investment advisory and other fees paid by the mutual fund in relation to the fees paid by the plan." We believe this is reasonable and can be acknowledged by the proper plan fiduciary before entering the open MEP arrangement. Section II(f) then requires the independent fiduciary to be notified of any changes in the rates and fees and approve those in writing. We believe this is unworkable. The open MEP is designed to reduce administrative burdens on smaller plans by allowing them to join the MEP arrangement. It is unreasonable to believe that all independent plan fiduciaries of the underlying employers will authorize these fee changes in writing. However, we agree that a conflicted plan fiduciary, such as a Commercial Entity open MEP sponsor, cannot exercise its fiduciary powers to increase fees absent approval of the plan fiduciaries of the underlying employers. Therefore, we propose modifying Section II(f) of PTE 77-4 to establish a negative consent process for any plan fiduciary of the underlying participating employer.

We are cognizant of the DOL's concerns about potential conflicts of interest and the potential harm they can have on participants trying to save for a successful retirement. We also are aware that, while 408(b)(2) would apply in these situations, the oversight role of the participating employer fiduciary may provide less protection to plan participants in a MEP with very small employers than it does in other scenarios. As discussed previously in this letter, we believe adoption of the additional oversight requirements found in the SECURE Act would address this concern.

4. *The current regulation contains provisions that limit the breadth of ERISA section 3(5)'s ''indirectly in the interest'' clause as applied to the two types of multiple employer plans covered by that regulation. For instance, in the case of a bona fide group or association, the regulation contains the commonality and control requirements. Are limiting principles or conditions needed in the case of open MEPs?*

We believe that the commonality and control requirements are not necessary, required or supported by the language of section 3(5) of ERISA. Section 3(5)'s focus is on whether or not the entity is acting on behalf of the employer with respect to an employee benefit plan.

While section 3(5) does make reference to groups and associations of employers, the language of the statute does not make them the exclusive party capable of acting on the employer's behalf. Section 3(5) speaks to a ***person*** acting indirectly in the interests of an employer in relation to an employee benefit plan. Groups and associations are mentioned as other entities that may meet this requirement, but it is not meant to be a limitation. Nowhere in the language of section 3(5) is the concept of commonality or control raised, which is appropriate given that the focus is on the person acting on behalf of the employer.

5. *Should the bona fide group or association provisions be amended by deleting the commonality and control requirements, and the prohibition on commercial entities? Should the PEO provisions be modified to cover commercial entities, but with additional or different criteria to reflect the differences between PEOs and these other entities?*

As discussed above, we believe that commonality and control requirements should be deleted. Once these requirements are eliminated, there is no need for the guidance as to what constitutes a bona fide group or association.

Similarly, we do not believe that the provision for PEOs is necessary, nor should it be modified to include other commercial entities. As we noted earlier, in defining a bona fide PEO, DOL relies on activities that are largely unrelated to maintaining an employee benefit plan. The safe harbor criteria for determining whether a PEO is performing substantial employment functions include: payment of wages to employees of their clients, assuming responsibility withholding and payment of payroll taxes and participating in the recruiting, hiring and firing of workers. These activities are tangential to the administration and maintenance of an employee benefit plan at best. Requiring similar provisions for other service providers would not be consistent with the language of section 3(5).

Rather than focus on the organizational structure of groups and associations or what non-employee benefit plan functions commercial entities are assuming, DOL should consider amending the regulation to take into account whether the MEP sponsor is acting on behalf of the employer in taking on the administrative responsibilities of the retirement plan and ensuring that there is proper oversight.

6. *There are a number of costs and complexities associated with meeting the various qualification requirements under section 401(a) of the Code (e.g., nondiscrimination, exclusive benefit, minimum participation, minimum coverage, and top-heavy requirements). Could the cost and complexity of these requirements offset some of the savings otherwise associated with establishing and maintaining an open MEP?*

We recognize that the DOL cannot solve the problems created by the Internal Revenue Code and associated regulations (Code). We think it is important to illustrate them, however, in order to highlight the reality that the cost savings of plan pooling under current law is derived primarily from pooled investment management, not from pooled administration. This reality makes it all the more essential that the DOL find solutions to the issues raised in question 3 of the RFI that strike an appropriate balance between encouraging the fees savings that are available when using investment products involving conflicts of interest, including proprietary products, and the need to protect plan participants against potential harm arising from those conflicts.

Tax code rules are burdensome for MEP administration in two distinct ways. One is that the general Code rules applicable to all 401(a) plans tend to disproportionately create problems in small plans. Small plans are more likely to be top heavy, more likely to have nondiscrimination tests negatively impacted by the hiring or firing of a single employee, and more likely to have significant disparity in wages among highly compensated and non-highly compensated employees making it difficult to satisfy the average deferral percentage (ADP) test in 401(k) plans. Since all of these Code requirements are applied at the individual participating employer level in a MEP, there is no cost savings from plan pooling.

Compounding this problem is that fact that under IRC § 413(c) and other Code rules, including vesting and eligibility, are applied across the entire MEP. This adds to the cost of MEP administration, as it requires a tool to be developed so that participating employers can take service with other participating employers into account when determining when a new employee can enter the plan and what their vested percentage should be.

In summary, pooled administration generally does not contribute to the benefits of offering open MEPs in terms of cost savings to participating employers. Those benefits are primarily derived from the advantages of pooled investment management and are enhanced when proprietary products are included in the investment menu.

We commend the DOL on undertaking this information gathering process and would welcome any opportunity to provide further information.

Sincerely,

Edmund F. Murphy III

Edmund F. Murphy III
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Empower Retirement