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U.S. Department of Labor
Employee Benefits Security Administration
Office of Regulations and Interpretations
200 Constitution Avenue N.W.
Room N-5655
Washington, DC 20210

RE: RIN 1210–AB92: ''Open MEPs'' and Other Issues Under Section 3(5) of the Employee Retirement Income Security Act

Dear Sir or Madam:

The Transamerica companies ("Transamerica")[1] are pleased to provide comments in response to the Request for Information ("RFI") issued by the Department of Labor (the Department) regarding the definition of "employer" in section 3(5) of the Employee Retirement Income Security Act of 1974, as amended (ERISA). The RFI was published in the Federal Register on July 31, 2019 and is referenced above. Transamerica commends the Department for publishing a final rule (MEP Final Rule) in this same Federal Register that helps to expand access to affordable quality retirement savings options by clarifying the circumstances under which an employer group or association or a professional employer organization (PEO) may sponsor a single workplace defined contribution retirement plan under title I of ERISA.

Transamerica is focused on helping customers achieve a lifetime of financial security. Transamerica products and services help people protect against financial risk, build financial security and create successful retirements. Transamerica designs customized retirement plan solutions for both for-profit and non-profit businesses nationwide. Transamerica provides services for over 29,000 plans that collectively include over 8 million participants and represent over $200 billion in plan assets as of December 31, 2018. Multiple Employer Plans comprise 277 of these plans for approximately 13,000 employers, with a combined total of 1,253,526 participants and represent a total of $34.5 billion in plan assets.

[1] Transamerica markets life insurance, annuities, retirement plans, and supplemental health insurance, as well as mutual funds and related investment products. Transamerica products and services are designed to help Americans protect against financial risk, build financial security and create meaningful retirements. Currently, Transamerica is among the ten largest distributors in the U.S. of variable annuities. Transamerica provides services and products through life insurance agents, broker-dealers, banks, wholesalers, and direct marketing channels as well as through the workplace. Transamerica has over 256,000 licensed producers in the United States. In 2016, Transamerica paid $6.9 billion in benefits to its policyholders.

Summary

The MEP Final Rule responds to Executive Order 13847, ''Strengthening Retirement Security in America'' issued on August 31, 2018 (Executive Order), which directed the Secretary of Labor to examine policies that would: (1) Clarify and expand the circumstances under which United States employers, especially small and mid-sized businesses, may sponsor or adopt a MEP as a workplace retirement option for their employees, subject to appropriate safeguards; and (2) increase retirement security for part-time workers, sole proprietors, working owners, and other entrepreneurial workers with nontraditional employer-employee relationships by expanding their access to workplace retirement plans, including MEPs. The RFI mainly seeks comments on whether to amend Department regulations to facilitate the sponsorship of ''open MEPs'' by persons acting indirectly in the interests of unrelated employers whose employees would receive benefits under such arrangements. The term ''open MEP'' refers to a single defined contribution retirement plan that covers employees of multiple unrelated employers. The information received in response to the questions in the RFI may form the basis of future rulemaking under ERISA. Following its comment letter (dated December 21, 2018) in response to the Notice of Proposed Rulemaking ("Proposed Rule") issued by the Department, Transamerica had hoped that the Department would have amended its regulations to allow open MEPs; however, Transamerica welcomes the opportunity provided by the RFI to further articulate its case on the critical need for open MEPs and their permissibility under ERISA's current statutory definition of "employer." As explained more fully below:

1. MEPs provide opportunities for expanding retirement plan coverage and open MEPs would substantially enhance those opportunities.

2. By definition, an open MEP is a multiple employer arrangement in which the participating employers do not have a commonality of interest; therefore, since the statute does not have a commonality or nexus requirement, the Department's inclusion of this requirement in the MEP Final Rule violates the statutory intent to allow open MEPs as a single plan.

3. Certain limiting principles and conditions that are included in the MEP Final Rule and which have no statutory basis -- namely, the control requirements and the substantial business requirements – would be overly constraining to the formation of open MEPs and, therefore, counterproductive to expanding workplace-based retirement plan coverage.

4. Transamerica supports legislative proposals to promote open MEPs, and such proposals (even if enacted) do not obviate the need for the Department to issue regulatory guidance that support open MEPs under the current statutory framework.

A critical reason why the Department's limiting principles and conditions are so problematic is that they render individuals or organizations affected, directly or indirectly, by them unsure as to their status under ERISA and as to the effect of certain acts and transactions related to the formation and operation of MEPs and their adoption by individual employers. The uncertainty and complexity arise out of the DOL's traditional approach of applying a facts-and-circumstances analysis to determine whether there is a sufficient common economic or representational interest among the employer members in order for there to be a bona fide employer group or association capable of sponsoring an ERISA plan on behalf of such employer members. This analysis has focused on three

broad sets of issues, in particular: (1) Whether the employers share some commonality and genuine organizational relationship unrelated to the provision of benefits; (2) whether the employers that participate in a plan, either directly or indirectly, exercise control over the plan, both in form and substance; and (3) whether the group or association is a bona fide organization with business/organizational purposes and functions unrelated to the provision of benefits. Unfortunately, this analytical approach has been preserved in the MEP Final Rule. We strongly urge the Department to eliminate these limiting principles and conditions, and, by so doing, to create the regulatory framework required for significantly expanding opportunities for increased MEP formation and coverage while ensuring that such employee benefit plans remain employment-based arrangements, as contemplated by ERISA. Certain other limiting principles and conditions found in the MEP Final Rule – namely, the requirements to have a formal organization structure and to limit plan participation to employees and former employees of employer members, constitute sufficient and appropriate safeguards against potential abuse and mismanagement. As the Department states, it has broad statutory authority to craft regulations under section 505 of ERISA. In fact, the Department specifically links this authority to the MEP issue, stating that the section 505 authority "extends to situation where, as here, the text of ERISA section 3(5) is ambiguous on its face." We do not, however, believe that there is any ambiguity in the statutory language about the limiting principles and conditions to which we strongly object in this letter.

I. MEPs provide opportunities for expanding retirement plan coverage and open MEPs would substantially enhance those opportunities.

Employer-sponsored defined contribution plans play a critical role in facilitating employee savings. The workplace retirement savings system has succeeded in serving as the preferred method of saving for retirement for millions of workers. With the benefits of saving in an employer-sponsored plan governed by ERISA (e.g., investment education, the potential for employer contributions, and fiduciary oversight), combined with the convenience of automatic payroll deduction, Americans are far more likely to save for retirement through participating in a workplace-sponsored retirement plan than through alternate savings structures. According to research from nonprofit Transamerica Center for Retirement Studies® (TCRS), 87 percent of workers who are offered a 401(k) or similar plan are saving for retirement, either through the plan and/or outside of work, compared to just 50 percent of workers who are not offered such a plan.[2]

The TCRS 18th Annual Retirement Survey of employers found that while 92 percent of large companies with 500 or more employees and 86 percent of medium-sized companies with 100 to 499 employees offer a 401(k) or similar employee-funded retirement plan, only 59 percent of small companies with five to 99 employees do so. Among companies that do not offer a 401(k) or similar plan, only 27 percent say that they are likely to begin sponsoring a plan in the next two years. Among those not planning to do so, their most frequently cited reasons are: company is not large enough (58 percent), concerns about cost (41 percent), employees are not interested (22 percent), and company or management is not interested (17 percent). However, ***an encouraging indicator is that 25 percent of those not likely to offer a plan say that they would consider joining a multiple employer plan (MEP) offered by a vendor who handles many of the fiduciary and administrative***

[2] TCRS is a division of Transamerica Institute® ("The Institute") a nonprofit, private foundation. The Institute is funded by contributions from Transamerica Life Insurance Company and its affiliates and may receive funds from unaffiliated third parties. For employers, especially small businesses, for which a stand-alone defined contribution plan is not feasible, the MEP offers an attractive solution by addressing the primary reasons that employers do not establish workplace retirement savings plans for their workers: cost, administrative burden and fiduciary liability concerns.

duties at a reasonable cost.[3]

The cost advantage of a MEP is realized by achieving economies of scale, both in terms of the number of plan participants and assets. Additional savings are achieved by spreading the cost among all the participating employers in the MEP. While the actual cost savings will depend on the number of participants, total assets, demographics of underlying adopting employers in a MEP and other variables, the savings in the MEP will grow with scale.

The liability and administrative advantages of an employer are generally achieved by delegating to a professional named fiduciary and plan administrator, respectively, the responsibility for operating the MEP. By delegating the responsibilities to professionals with the expertise and systems to operate and comply with legal requirements of operating a MEP, the quality of the MEP market is enhanced.

Once reform of MEPs to remove the "common interest" requirement for employers to join in a MEP is enacted, employers, including sole proprietors, from various industry and trades can efficiently save for retirement by joining in an "open MEP." Sole proprietors include independent workers, who by choice or circumstance, are not tied to a traditional employment arrangement, and who may earn their income from multiple sources.

The independent workforce has grown significantly in the last few decades. While there are many positive reasons associated with being an independent worker, a glaring downside is lack of access to workplace benefits, including the ability to save by payroll deduction into an employer sponsored retirement plan. Open MEPs can provide the benefits of workplace retirement plans to the independent worker.

While the rapid increase in the independent workforce is new, the legal structure is not. Independent workers are generally sole proprietors or unincorporated entities.[4] A sole proprietor, as well as any independent worker who has structured his or her business as a partnership, limited liability company or corporation, can set up a qualified retirement savings plans through which he or she can save for retirement on a pre-tax basis. Independent workers, however, are not likely to establish a retirement plan for themselves as they generally lack the expertise and funds to establish a plan and do not want to assume the administrative burden or fiduciary liability of operating the plan.

Under an open MEP many independent workers across various industries and work arrangements can simply join the MEP and thereby establish a workplace retirement savings arrangement for themselves, and join their arrangement with others in a single plan to achieve economies of scale and avoid the administrative burden and liability in running the plan. In fact the nexus or commonality requirement has for years in policy discussions been accepted as serving no policy reason for a MEP, and, along with the one bad apple rule, is cited as the primary reason for preventing wider use of MEPs as the ideal vehicle for enhancing coverage, especially among small employers. Under a MEP, a named plan fiduciary assumes responsibility for operating the MEP in compliance with ERISA, including selecting the investment funds for the plan, and a common record keeper and plan administrator manage the contributions from various sources within the

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[3] Nonprofit Transamerica Center for Retirement Studies® ("TCRS"), *Striking Similarities and Disconcerting Disconnects; Employers, Workers, and Retirement Security,* 18th Annual Transamerica Retirement Survey, 2018, p. 43: https://www.transamericacenter.org/docs/default-source/retirement-surveyofemployers/tcrs2018_sr_employer-retirement-research.pdf

[4] https://www.irs.gov/businesses/small-businesses/small-businesses-self-employed/sole-proprietorships

MEP. The result is an effectively managed plan, the costs of which are shared by the various employers participating in the MEP.

II. By definition, an open MEP is a multiple employer arrangement in which the participating employers do not have a commonality of interest; therefore, since the statute does not have a commonality or nexus requirement, the Department's inclusion of this requirement in the MEP Final Rule violates the statutory intent to allow open MEPs as a single plan.

In the RFI, the Department states that the term "open MEP" refers to "a single defined contribution retirement plan that covers employees of multiple unrelated employers." The Department provides this definition in order to distinguish this type of plan as not permissible under the MEP Final Rule. Yet, the statutory language which the Department is interpreting in the MEP Final Rule does not make a distinction between the so-called "closed" MEPs permitted under the MEP Final Rule and the open MEPs for which the Department seeks information through the RFI. Under the statutory framework, the Department should not require, and does not have the authority to require, employers participating in an open MEP to have a commonality of interest or any type of nexus among the participating employers. The Department lacks the authority to require a commonality of interest in an open MEP simply because the governing statutory provision - ERISA section 3(5) – neither explicitly nor implicitly requires the employer members of the group or association to have a commonality of interest. By including the commonality of interest requirement in the MEP Final Rule, the Department frustrates the statutory intent to allow open MEPs and unduly discourages plan formation in a sector of the workplace where retirement planning needs continue to be underserved.

The lack of necessity for this limiting condition is made clear by the fact that employer members will have an inherent common interest to ensure that the plan sponsored by the group or association is administered properly and in the interest of their respective employees. Indeed, in the MEP Final Rule, the Department acknowledges that the participating employers in any MEP arrangement retain a fiduciary responsibility for choosing and monitoring the arrangement. Thus, these employers would already have a shared interest, and it is one that helps to avoid abuse, fraud and mismanagement by the MEP provider. Accordingly, the Department should focus its regulatory efforts in this space on strengthening this collective responsibility. Furthermore, the absence of a common interest or nexus among the member employers does not preclude the group or association from acting in the member employers' interest or on their behalf as the statutory definition of employer requires. There is no basis to believe that the group or association is less likely to act for the interest of employer members than if they are in the same trade, industry, line of business or profession, or have their principal place of business in the same region that does not exceed the boundaries of a single state or a metropolitan area (even if the metropolitan area includes more than one State). These are artificial limitations that have no relevance on how a MEP sponsor would treat member employers. What does have relevance is the ongoing fiduciary obligations on the part of the group or association to act in the best interest of the plan and its participants, as already required by ERISA.

According to the Department, determinations of what is a ''trade,'' ''industry,'' ''line of business,'' or ''profession,'' as well as whether an employer fits into one or more of these

categories, are based on all the relevant facts and circumstances. This approach leads to a lack of clear guidance regarding the commonality of interest requirement and imposes undue burdens on potential plan formations resulting from the uncertainty and complexity that result from a "relevant facts and circumstances" determination. While the Department claims that, in general, the Department intends for these terms to be construed broadly to expand employer and employee access to MEPs, this would not eliminate the need to incur the cost of consulting legal counsel or seeking formal guidance from the Department directly to make a determination based on the particular situation of each employer. Professional MEP sponsors will not be able to address the application of the relevant facts and circumstances inquiry to an employer's specific fact patterns and would have to rely on a representation by the employer regarding the commonality of interest. This approach by the Department is highly burdensome, particularly for small employers.

In addition to not having any basis in ERISA, the commonality of interest requirement is contrary to the Executive Order's direction to eliminate rules that impose costly regulatory burdens and complexity on businesses in establishing workplace retirement plans. As discussed above, there are safeguards already in place in the MEP Final Rule to help guard against potential abuse, fraud and mismanagement by MEP providers. Elimination of the common interest requirement will increase the number of small employers that provide a retirement plan for their employees by joining in a MEP, including independent workers.

III. Certain limiting principles and conditions that are included in the MEP Final Rule and which have no statutory basis -- namely, the control requirements and the substantial business requirements – would be overly constraining to the formation of open MEPs and, therefore, counterproductive to expanding workplace-based retirement plan coverage.

In addition to the common interest requirement, the requirements that the group or association be controlled by its employer members and that the group or association have at least one substantial business purpose unrelated to offering and providing employee benefits to its members have no statutory basis and are unnecessary for ensuring that employer groups and associations are "genuine." Because these requirements are not suitable conditions for any type of MEP, they should be eliminated. The Department has authority to interpret the statutes it administers, including ERISA section 3(5) pertaining to bona fide groups or associations of employers and it is appropriate to clarify how the statutory definition of ''employer" should apply to open MEPs under title I of ERISA. The Department, however, risks overreaching when interpreting the term ''employer'' for purposes of ERISA section 3(5) as requiring the control and substantial business purpose conditions for groups and associations of employers. This is particularly true in light of the Executive Order which requires the Department to facilitate the adoption and administration of MEPs and thereby expand access to workplace retirement plans, especially for employees of small and mid-size employers and for certain self-employed individuals. Any rule permitting open MEPs should have more flexible standards and criteria for sponsorship of open MEPs than currently articulated in the MEP Final Rule. Accordingly, the Department should eliminate the control and substantial business purpose requirements for the group or association that establishes the open MEP.

Control requirements.

The MEP Final Rule requires that member employers control the functions and activities of the

group or association sponsoring the MEP, and that the employer members that participate in the plan control the plan. The Department also states that control must be present "both in form and in substance." The concern is that the control requirement has no statutory basis and the Department is exceeding its interpretative authority. Admittedly, the members of any organization such as a group or association are going to exercise some level of control on the organization but the level of control should be determined based on the particular characteristics of the organization and what suits the organization's needs and objectives. The Department has not presented any findings or evidence which suggest that lack of control by the members of a MEP creates a propensity towards fraud or abuse or makes mismanagement of the MEP more likely. As long as the group or association fulfills its function of acting in the interest of the members with respect to employee benefits, the level of control exercised by the members upon the group or association should be irrelevant.

According to the Department, all relevant facts and circumstances must be considered in determining whether the functions and activities of the group or association are sufficiently controlled by its employer members, and whether the employer members who participate in the group or association's pension plan sufficiently control the group plan. This analytical approach is similar to the one required for the commonality of interest requirement, which generates uncertainty and complexity. Again, from a cost reduction perspective, this is problematic because it requires the participating employer to go through a legal analysis possibly requiring the retention of legal counsel to make the determination or seeking guidance from the Department to address specific circumstances.

In the Department's view, the following factors, although not exclusive, are particularly relevant for the control analysis: (1) Whether employer members regularly nominate and elect directors, officers, trustees, or other similar persons that constitute the governing body or authority of the employer group or association and plan; (2) whether employer members have authority to remove any such director, officer, trustees, or other similar person with or without cause; and (3) whether employer members that participate in the plan have the authority and opportunity to approve or veto decisions or activities which relate to the formation, design, amendment, and termination of the plan, for example, material amendments to the plan, including changes in coverage, benefits, and vesting. According to the Department, it ordinarily will consider there to be sufficient control if these three conditions are met. We think that the relevant inquiry is the degree to which an employer member is able to "walk with its feet" from the arrangement, under a contract termination standard similar to the one in section 408(b)(2) of ERISA. The MEP contract or arrangement is only reasonable if it permits termination by the member employer without penalty on reasonably short notice under the circumstances to prevent the employer member from becoming locked into an arrangement that has become disadvantageous (for example, for reasons regarding fraud, abuse or mismanagement of the plan by the group or association). Such a reasonableness standard, which is already well established in the ERISA context for a number of areas, could be highly effective in empowering employer members against arbitrary actions of the group or association.

Because employer membership in a group or association is presumably always voluntary, employers would already exercise control to the extent that they choose whether to participate in the plan. This is functionally equivalent to the pre-approved plan context where an employer may have little or no say with respect to the terms or operation of a plan, yet the employer is able to exercise ultimate "control" in deciding whether to begin or cease offering the plan to its employees. Another example is the "81-100" group trust arrangement where control by the plan investors over the group trust sponsor is not a requirement. There is no rational basis for requiring greater control for a MEP if it is not required in the single employer plan context. Accordingly, we urge the Department to

eliminate the control requirements and instead adopt a reasonableness standard for the terms of the arrangement pertaining to termination by a participating employer of its membership in the group or association.

Substantial business purpose requirement.

The MEP Final Rule requires that a group or association of employers have at least one substantial business purpose unrelated to offering and providing MEP coverage or other employee benefits to its employer members and their employees, even if the primary purpose of the group or association is to offer such coverage to its members. According to the Department, this limiting principle or condition helps ensure that the association is a bona fide association of employers, rather than merely a commercial arrangement or entity marketing retirement benefits and services to customers on a commercial basis. However, the statutory language defining employer does not provide for a carve-out from bona fide groups or associations for any entities that market retirement benefits and services to customers on a commercial basis. Such marketing activity by commercial entities may be of significant benefit to small employers who have very little exposure to the retirement services marketplace and may help to expand coverage in this critical part of the workforce.

The MEP Final Rule then provides a safe harbor provision which specifies that the ''substantial business purpose'' requirement is deemed satisfied if the group or association would be a viable entity, even in the absence of sponsoring an employee benefit plan. The Department, however, does not define the term "viable entity" for purposes of this requirement. Upon closer examination, the substantial business purpose requirement appears to lack any substance or any basis under ERISA. Furthermore, there is no basis for reading into ERISA's text a requirement that a group or association of employers remain a viable entity even if its principal (or sole) reason for being (i.e., the offering of employee benefits) is removed. This requirement will simply result in the unnecessary creation of work or a "purpose" for the group or association (when not already present) beyond the offering of employee retirement or health benefits. This, in turn, will only increase costs to the employer members and discourage the greater use of MEPs. Accordingly, the Department should eliminate this requirement.

IV. Transamerica supports legislative proposals to promote open MEPs, and such proposals (even if enacted) do not obviate the need for the Department to issue regulatory guidance that support open MEPs under the current statutory framework

Transamerica supports open MEPs, whether promulgated by regulation or enacted through legislation. While we look forward to also working with the Department on any issues to be dealt with by regulation, Transamerica will also support the legislative efforts, such as H.R.1994 - Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act). Transamerica views the legislative proposal as an additional avenue for promoting open MEPS and not a substitute for the regulatory interpretation of the existing statutory provision which permits open MEPs. Open MEPs are a significant tool in helping more businesses provide retirement plans for their employees, as well as working owners to save for retirement.

Conclusion

Transamerica also commends the IRS for taking action to eliminate the unified plan rule which

serves as a disincentive to employers that would otherwise consider joining a MEP. MEPs are a significant tool in helping more businesses provide retirement plans for their employees. Transamerica appreciates the Department's consideration of these comments. With regards to the specific points presented in this letter, Transamerica agrees with the arguments enunciated by the American Council of Life Insurers (ACLI). Expanding retirement plan coverage among small businesses and working owners is critical to enhancing the retirement security of individuals and the well-being of their immediate families.

Sincerely,

Kent Callahan