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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

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

Greetings:

On behalf of the American Council of Life Insurers (ACLI)[1], we appreciate the opportunity to provide comments in response to the Request for Information (RFI) issued by the Department of Labor (the Department) seeking views on multiple employer defined contribution pension plans (MEPs). More Americans, especially those employed by small businesses, need an opportunity to save for retirement at work. MEPs can help make that happen. The Employee Retirement Income Security Act of 1974, as amended (ERISA) provides the Department with the authority to make rules permitting MEP development, helping solve the challenge of small business plan expansion.

As leading providers in the small plan marketplace[2], ACLI members agree that a critical challenge in enhancing Americans' retirement security is expanding access to workplace retirement savings. ACLI strongly supports efforts to enhance coverage under the private sector employee benefit plan system. The House passed Setting Every Community Up for Retirement Enhancement (SECURE) Act would expand and enhance employers' access to and utilization of MEPs by affirming, consistent with current law, that unrelated employers can sponsor a MEP. These "open MEPs" can

[1] The American Council of Life Insurers (ACLI) advocates on behalf of 290 member companies dedicated to providing products and services that promote consumers' financial and retirement security. 90 million American families depend on our members for life insurance, annuities, retirement plans, long-term care insurance, disability income insurance, reinsurance, dental and vision and other supplemental benefits. ACLI represents member companies in state, federal and international forums for public policy that supports the industry marketplace and the families that rely on life insurers' products for peace of mind. ACLI members represent 95 percent of industry assets in the United States. ACLI member companies offer insurance contracts and other investment products and services to qualified retirement plans, including defined benefit pension and 401(k) arrangements, and to individuals through individual retirement arrangements (IRAs) or on a non-qualified basis. ACLI member companies also are employer sponsors of retirement plans for their own employees.
[2] Three-fifths of small employers (those with 99 or fewer employees) rely on life insurer products and services in their employment-based retirement plan.

help small business owners achieve economies of scale with respect to plan administration and advisory services, making plan sponsorship much more affordable and effectively managed, and thereby encouraging more small employers to offer their employees retirement plans. While it is our hope that SECURE will pass the Senate and become law this year, given the retirement plan access and savings challenges faced by many Americans today, the Department can and should act to expand employee access to employee benefit plans through open MEPs.

The Department's recent Association Retirement Plan guidance is an important step in expanding small business plan sponsorship. However, more can be done.

Our comments are responsive to RFI Section A, "Open MEPs" Questions 1-5. To facilitate the expansion of workplace savings plans, especially for small businesses, the Department should:

A. remove the commonality requirement from MEP sponsorship to permit employers to freely engage with other employers to jointly sponsor an employee benefit plan;

B. expand market solutions for small businesses by recognizing that "any person" includes regulated financial institutions willing to sponsor a MEP; and

C. provide targeted exemptive relief for regulated financial institutions that sponsor MEPs.

The definition of "employer" in ERISA envisions and supports any person willing to act indirectly in the interest of an employer in relation to an employee benefit plan. While the definition notes that this would include groups or associations of employers, it does not place limitations on who can act indirectly for whom nor which employers may join together to sponsor a plan.

Employers seeking a MEP sponsor should be able to engage a regulated financial institution as a sponsor of a MEP. In addition to being subject to regulation and oversight that protects their customers' interests, these institutions have the capacity and expertise to provide all of the services and investment alternatives necessary for a comprehensive benefit plan. ERISA and Department rulings recognize the role that insurance companies, banks and trust companies play in support of employee benefit plans.

Regulated financial institutions willing to sponsor a MEP should have exemptive relief that supports their efforts to expand the market for retirement solutions for small businesses and protects the interests of adopting employers, plan participants and beneficiaries.

A. Modern Workplace Benefit Plans Should have the Advantage of the Full Scope of the ERISA Definition of Employer

I. The Department Should Remove the Commonality Requirement

Neither ERISA nor the Internal Revenue Code impose a "nexus" or "commonality of interest" requirement on employers seeking to jointly sponsor a plan. ERISA section 3(5) provides that the term "employer" includes "any person" acting directly as an employer and "any person" acting "indirectly in the interest of an employer, in relation to an employee benefit plan; and includes group or association of employers acting for an employer in such capacity." In issuing rulemaking on Association Retirement Plans, the Department limited its guidance to persons that are groups or associations of employers acting as an employer, noting its policy regarding ERISA section 3(5) in

which it views the definition as imposing a commonality of interests requirement on employers willing to jointly offer a single employee benefit plan.

ERISA section 3(5) does not require that there be a group or association of employers acting for an employer, it merely notes that such group or association is an example of a person that can act indirectly in the interest of an employer. The key word in the definition is the word "*includes*." If Congress intended that only such group or association could be such person, it would not have used the word "includes." Further, 29 CFR 2530.210(c)(3) makes clear that, for purposes of ERISA, a "multiple employer plan" shall mean a multiple employer plan as defined in section 413(b) and (c) of the Code. Neither section 413(c) of the Code nor Treasury Regulation section 1.413-2 require a "unique nexus" between the employers that maintain a multiple employer plan. For purposes of the Code and therefore ERISA, a multiple employer plan is simply a plan maintained by more than one employer. No "nexus" among the employers is required.

The Department's prior interpretations which limit who may serve "indirectly in the interest of an employer," in relation to an employee benefit plan under ERISA, have had a chilling effect on the establishment and maintenance of MEPs. This has increased the cost of operating and maintaining existing plans, all to the detriment of the employees of small businesses. The Department must correct this – and, in doing so, can meaningfully impact the ability of Americans to access retirement plans and save for a secure retirement. A failure to eliminate this extralegal requirement frustrates the goals of those who enacted ERISA. It would be greatly beneficial to the evolution of workplace benefit plans for the Department to abandon unnecessary, situational interpretations of who may, and how employers may engage persons to, serve indirectly in the interest of an employer in relation to an employee benefit plan under ERISA.

Moreover, the Department has concluded that it is not limited by its prior interpretations or case law in adopting a more flexible regulatory test. Indeed, in its final Association Health Plan (AHP) Rule, the Department stated that neither its previous advisory opinions nor relevant cases have ever held that the Department is foreclosed from adopting a more flexible test or departing from the factors it previously relied upon in determining whether a group or association can be treated as acting as an "employer" or "indirectly in the interest of an employer," for purposes of the statutory definition.[3]

II. Broaden MEP Benefits

The revocation of prior guidance, which added a commonality requirement to ERISA section 3(5),) must) should be done in a way that broadly effects the application of the definition of employer with respect to any employee benefit plan as defined in ERISA section 3(3) which would include plans that offer life and disability benefits. While the Department limited the scope of the RFI to retirement plans, it has acknowledged in the past that "as more Americans engage in part-time, contract, self-employment, or other alternative work arrangements, it is increasingly important that retirement plans and *employee benefit regulation in general* allow for more flexible, portable benefits." (emphasis added).[4] In this regard, the Department, in the preamble accompanying the

[3] *See* 83 Fed. Reg. 28914 (June 21, 2018).
[4] 83 Fed. Reg. 28915, n. 10 (June 21, 2018).

AHP rule, further indicated that it "will consider comments submitted in connection with this rule as part of its evaluation of MEP issues in the retirement plan and other welfare benefit plan contexts."[5]

The Department has an opportunity to move away from a narrow, benefit-centric approach to a broader view of the statutory term "employer" for purposes of MEP sponsorship. The same policies that support a review of the sponsorship rules pertaining to group health benefits and retirement benefits support a review of the rules pertaining to other ERISA-covered benefits. Namely, expanded employee access to coverages that enhance financial security, reduced fees and administrative expenses, plan management by benefits professionals, and reduced exposure for participating employers to fiduciary liability, among other things.

In virtually every respect, the identified benefits flowing to employers and their employees through participation in an AHP or ARP would serve employers electing to offer their employees life, disability and other ERISA-covered benefits through participation in MEPs. Accordingly, we see no policy reason why the Department's efforts regarding the definition of "employer" should be limited. The Department should, independent of its review of comments on the subject RFI, take steps to expand access to benefits that serve to enhance the financial security and overall financial wellness of American workers.

III. The Department Has Yet to Fulfill the President's Executive Order

On August 31, 2018, President Trump issued an Executive Order on "Strengthening Retirement Security in America."[6] Section 1 of the Executive Order states that "expanding access to multiple employer plans (MEPs), under which employees of different private-sector employers may participate in a single retirement plan, is an efficient way to reduce administrative costs of retirement plan establishment and maintenance and would encourage more plan formation and broader availability of workplace retirement plans, especially among small employers." Accordingly, the Executive Order directs the Secretary of Labor to, within 180 days of the date of the order, consider, consistent with applicable law and the policy set forth in section 1 of the order, whether to issue a notice of proposed rulemaking, other guidance, or both, that would clarify when a group or association of employers or other appropriate business or organization could be an "employer" within the meaning of section 3(5) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1002(5).

While the Association Retirement Plan rule provides clear guidance for members of associations, the Department continues to maintain a position that the statute does not support, *i.e.,* that there must be a "nexus" or "commonality of interest" among employers for a group of employers to meet the definition of an "employer" within the meaning of ERISA section 3(5). The Executive Order policy statement support expanding access to MEPs *for employees of different private-sector employers* (emphasis added). The Administration's policy statement does not include restrictions, such as employees of different private sector employers in the same profession, or in the same geographic region. Further, although the policy directs the Department to "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

[5] *Id.* at 28916, n. 10 cont.
[6] Executive Order 13847 (Aug. 31, 2018).

appropriate safeguards, the Department has not demonstrated that the commonality restriction is such a safeguard.

Consistent with the August 31, 2018 Executive Order, the Department should revoke its prior guidance limiting employer options regarding MEPs. It should be sufficient that a person, as defined in ERISA 3(9), establish that said person is acting indirectly in the interest of an employer in relation to an employee benefit plan, regardless of whether the person is or is not a group or association, with or without some participating employer "nexus" or "commonality of interest."

A. Facilitate the Expansion of Market Solutions for Small Businesses by Supporting Employers that Engage Regulated Financial Institutions as Sponsors of MEPs

The Department should recognize that the phrase "any person" as used in ERISA 3(5) includes insurance companies, banks and trust companies. Thus, the rules must permit these financial institutions to serve as MEP sponsors. The marketing of retirement plan services has led to the dramatic level of plan sponsorship we see today. Employers learn of plan sponsorship opportunities from financial institutions and their representatives. Plan sponsors learn of innovations in plan design and services from their service providers. Americans without access to a workplace retirement plan predominately work for small businesses. Participation of financial services entities – from the outset –can serve to ensure a robust and competitive MEP marketplace. A robust MEP marketplace presents a great opportunity to expand access to workplace retirement savings plans to more and more Americans. Consistent with ERISA Section 3(9), a person who acts indirectly in the interest of an employer in relation to an employee benefit plan may include a corporation, mutual company, and trust. Given the absence of clear legal authority, the Department should not restrict employers from engaging financial institutions willing to sponsor a MEP.

B. Provide Targeted Exemptive Relief for Regulated Financial Institutions That Sponsor MEPs.

As discussed above, financial services firms have substantial operational and administrative expertise associated with the establishment and maintenance of a retirement plan and accordingly are uniquely qualified to act as a MEP sponsor. While there may be some complexities associated with a financial services firm acting as a fiduciary MEP sponsor, such complexities are not insurmountable. In that regard, RFI question #3 includes several inquiries regarding the potential conflicts of interest that may arise if commercial entities are permitted to sponsor an open MEP. These issues primarily focus on the ability of a MEP sponsor to offer its own products and services and be compensated for its services while acting as ERISA fiduciary. Compensation to a plan fiduciary for services provided to a plan is not an issue of first impression. Indeed, Congress included Section 408(c) in ERISA, which specifically recognizes that a fiduciary may be "reasonably" compensated for providing services to a plan. Further, the Department has historically addressed the disclosure and mitigation of fiduciary compensation and potential conflict issues through the issuance of prohibited transaction exemptions.

Accordingly, we recommend that, concurrent with rulemaking specifically providing that a financial services firm may act as a MEP sponsor and thus a named fiduciary, the Department issue a class prohibited transaction exemption with the following parameters and compliance requirements:

I. **Limit Availability to Certain Financial Services Entities.** We recommend that prohibited exemption relief be available only to those entities that qualify as trustees for qualified trusts under section 401(f) of the Internal Revenue Code, i.e., insurance companies, banks and other

permitted persons (s*imilar rules apply to IRA*s). Doing so would limit exemptive relief to well-regulated financial services entities with retirement plan operational, administrative and compliance knowledge and expertise. We note that the Department imposed a similar limitation in Prohibited Transaction Exemption 2006-06, in its determination of entities that may act as a "qualified termination administrator" or QTA and select itself or an affiliate to provide service to the plan, to pay itself or an affiliate fees for those services, and to pay fees for services provided prior to the plan's deemed termination, in connection with terminating the abandoned plan. In its abandoned plan rulemaking, the Department stated that "[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."[7] Given that here, as well, a MEP plan sponsor will also be acting as a fiduciary, providing services to the plan, and paying itself for such services, the Department should limit the universe of providers as it did in the abandoned plan regulation and PTE 2006-06.

II. Address the Use of Proprietary Services and Products. It is reasonable to anticipate that financial services firms that are MEP sponsors will include proprietary services (such as recordkeeping) and/or products (such as investment alternatives). As such, class exemption relief should be conditioned on the necessity of such services and products and the reasonableness of the cost of such services and products when borne by the plan and its participants and beneficiaries. There is a strong basis for the Department's inclusion of these requirements in a MEP sponsor class exemption, as they are currently included within ERISA's section 408(b) statutory exemption, which addresses transactions between a plan and a party in interest to such plan.

III. Confirm the Applicability of Existing Employer and Participant Service and Fee Disclosure Requirements. The Department has already implemented a robust and meaningful service and fee disclosure regime under 404a-5 and 408(b)(2).[8] We recommend that the Department confirm that these disclosure requirements apply to financial services firms that act as a MEP sponsor and provide appropriate clarifications to these disclosure requirements as necessary to reflect the fact that the MEP is sponsored by a financial institution. Thus, the Department should confirm that the MEP sponsor has the obligation of the plan administrator under the 404a-5 regulations to furnish participants with information regarding the plan, including information regarding the fees and expenses associated with all investment alternatives. This would allow participants to make informed choices about the management of their individual accounts. The Department should confirm or clarify that the MEP sponsor would have to provide its contact information as the plan administrator, pursuant to 29 CFR 2550.404a-5(d)(2)(i)(A). The Department should also confirm that the MEP service providers must disclose to each participating employer all compensation, both direct and indirect, that is or is reasonably anticipated to be received by the MEP sponsor for recordkeeping and/or investment management services. Further, the Department may wish to consider an additional requirement that the MEP sponsor must disclose any limitations the MEP sponsor has implemented with

[7] 71 Fed. Reg. 20820, 20821 (April 21, 2006).
[8] *See* 29 CFR 2550.404a-5, 2550.408b-2.

respect to the plan's investment alternatives. These disclosures will serve to assist both participants and participating employers in understanding the existence and nature of any potential conflicts associated with the provision of services or investment products to the MEP. We recommend that employer disclosure be provided prior to execution of a participation agreement or other contractual agreement between the participating employer and the MEP, consistent with the existing requirements of the 408(b)(2) regulation.

IV. Independent Audit Requirement. In order to further mitigate any concerns the Department may have regarding conflicts of interest associated with a financial services firm's sponsorship of a MEP, we recommend that exemptive relief be conditioned on compliance with an annual independent audit requirement, separate and apart from any financial audit of the MEP required in accordance with applicable ERISA reporting requirements.

The annual audit would be required to be conducted by an auditor independent of the MEP sponsor, with appropriate technical training or expertise, and would include an audit of the MEP sponsor's compliance with ERISA's requirements, including, but not limited to (1) whether the services and products provided are necessary for the operation of the plan (2) whether fees and expenses paid to the MEP sponsor are reasonable, and (3) whether the MEP sponsor is compliant with all applicable participant and employer disclosure requirements. Development of this type of audit requirement will not require the Department to recreate the wheel. Indeed, in developing this audit requirement, we recommend that the Department consider and use as a guide the independent audit requirements contained in section (b)(6) of the final participant and beneficiary investment advice regulation.[9] As such, the audit requirement should include a report to the MEP sponsor with findings, an opportunity for the MEP sponsor to correct any non-compliance issues, and, in the absence of correction, notification to the Department. A copy of the compliance audit would also be provided to participating employers.

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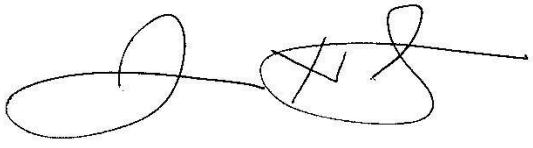
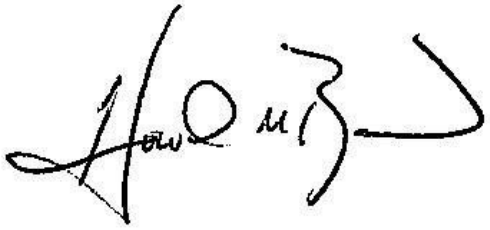
On behalf of the ACLI member companies, thank you for your consideration of these comments. We welcome the opportunity to discuss these comments and engage in a productive dialogue with the Department and Service.

Respectfully,





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[9] *See* 29 CRF 2550,408g-1.