October 29, 2019

Submitted via www.regulations.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. DOL of Labor
200 Constitution Ave., NW
Washington, DC 20210

RE: RIN 1210–AB92 "Open MEPs" and Other Issues under Section 3(5) of ERISA

Dear Sir/Madam:

The American Benefits Council ("Council") appreciates the opportunity to respond to the U.S. Department of Labor's Employee Benefits Security Administration (DOL) request for information (RFI)[1] regarding "open" multiple employer plans (MEPs) and whether the DOL should amend its 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 plans.

The American Benefits Council is a Washington D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and families. Council members include over 220 of the world's largest corporations and collectively either directly sponsor or support sponsors of health and retirement benefits for virtually all Americans covered by employer-provided plans.

[1] 84 Fed. Reg. 37,545 (July 31, 2019).

As we expressed in our comments on the DOL's proposed regulation regarding association retirement plans (ARPs) and other MEPs,[2] the Council strongly supports legislative and regulatory action to expand access to workplace retirement plans by reducing the administrative burdens and costs of sponsoring a plan. The DOL's MEP Final Rule took a step in this direction by expanding the situations in which an employer group or association may sponsor a MEP that is treated as a single plan for purposes of the Employee Retirement Income Security Act of 1974 (ERISA), as well as clarifying the circumstances under which a professional employer organization (PEO) may sponsor a MEP. However, as discussed below, the Council believes that the DOL underutilized its authority to further expand the use of MEPs, and that the DOL's facilitation of open MEPs could be accomplished by removing the regulatory constraints on MEPs that have no basis in the statutory language of ERISA.

The Council's responses to a number of the DOL's questions regarding open MEPs, as set forth in the RFI, are provided below.

A.1. Should the DOL amend 29 C.F.R. 2510.3-55 to expressly permit financial institutions or other persons to maintain a defined contribution open MEP?

Yes. The Council strongly encourages the DOL to expressly permit financial institutions or other persons to maintain defined contribution open MEPs by amending its regulations. As we address in more detail below, doing so would more effectively serve the stated goals of the Trump Administration, strengthen the validity of the MEP Final Rule, and expand retirement plan coverage for workers at small and mid-sized businesses in particular.

Permitting open MEPs would be consistent with the President's Executive Order.

President Trump's executive order on "Strengthening Retirement Security in America" ("Executive Order")[3] directed the DOL to consider issuing guidance clarifying when employer groups or associations could be an employer within the meaning of Section 3(5) of ERISA "to the extent consistent with applicable law." Because several of the restrictive conditions on "bona fide" group or association MEPs in the MEP Final Rule neither have a basis in ERISA nor are necessary for determining the presence of an employment-based arrangement, the DOL's recent rulemaking falls short of the goals set forth by the President in the Executive Order. Allowing for open MEPs would more thoroughly accomplish the President's directive.

Permitting open MEPs by eliminating the conditions on MEPs that have no basis in ERISA would strengthen the validity of the DOL's MEP Final Rule.

[2] 83 Fed. Reg. 53,534 (Oct. 23, 2018) ("MEP Proposed Rule"). The MEP Proposed Rule was finalized in July 2019 ("MEP Final Rule"). 84 Fed. Reg. 37,508 (July 31, 2019).

[3] Executive Order 13847 (Aug. 31, 2018).

In the context of a single employer plan, a plan is generally subject to ERISA as long as the plan is being provided by an employer for the benefit of its employees. The same principle should apply with respect to open MEPs – as long as the MEP consists of employers providing retirement benefits for the benefit of such employers' employees, there is no statutory basis for requiring additional arbitrary conditions such as the nexus or commonality of interest requirements that are imposed on "bona fide" groups and associations in the MEP Final Rule. Similarly, there is no indication in ERISA that limits based on geography or line of business are appropriate in determining what constitutes a group or association of employers, as is also required under the MEP Final Rule. These conditions that have no basis in the statute undermine the validity of the DOL's recent efforts with respect to MEPs.

In an analogous context, the U.S. Court of Appeals for the Seventh Circuit found that a geographic limitation, similar to the one in the MEP Final Rule, was "unreasonable" and was therefore "invalid."[4] In the Seventh Circuit case, the issue was whether a trust maintained on behalf of the employees of multiple employers qualified as a voluntary employees' beneficiary association ("VEBA") under Section 501(c)(9) of the Internal Revenue Code. Under the Treasury DOL's VEBA regulations at issue, the membership of a VEBA:

> must consist of individuals who become eligible to participate by reason of their being employees and whose eligibility for membership is defined by reference to objective standards that constitute an employment-related common bond among such individuals . . . *[E]mployees of one or more employers engaged in the same line of business* ***in the same geographic locale*** *will be considered to share an employment-related bond*.[5] [Emphasis added.]

The issue in this case, as with the MEP Final Rule, is that "some employment-related bond is necessary to distinguish true VEBAs from entrepreneurial commercial"[6] enterprises. The court rejected the geographic locale requirement in strong terms:

> geography alone has no reasonable or logical relation to the establishment of an "employment-related bond" . . . We . . . conclude that the Secretary's distinction among VEBAs based on geography is unreasonable . . . . Accordingly, [the VEBA regulation] is invalid to the extent that it requires associations whose membership consists of employees of one or more employers engaged in the same line of business to meet the added "same geographic locale" restriction…[7]

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[4] Water Quality Ass'n Employees' Benefit Corp. v. United States, 795 F.2d 1303 (7th Cir. 1986).

[5] Treas. Reg. § 1.501(c)(9)-2(a)(1).

[6] Water Quality at 1309.

[7] *Id.* at 1311, 1313.

This case is noteworthy in the context of open MEPs in multiple regards. First, it presents a very similar issue to the MEP issue: when is there a sufficient bond among employers to constitute a bona fide group? As the Seventh Circuit determined, geographic locale is irrelevant in that inquiry and any geographic restriction would be invalid. Second, the case does not necessarily hold that the line of business requirement is valid; that issue simply was not raised based on the facts of the case. Third, although the IRS has not acquiesced in the case, the holding of the Seventh Circuit has not been challenged by the IRS in the ensuing 33 years in any other Circuit, a rather telling sign of the strength of the holding in the case. Thus, in these and other regards, removing the conditions from the MEP Final Rule that are unsupported by statute will enhance the validity of the regulation.

There is no policy justification to refrain from permitting open MEPs.

The DOL acknowledged in the preamble to the MEP Proposed Rule that it is unaware of any evidence that defined contribution MEPs present a greater risk of fraud or abuse than single employer defined contribution plans.[8] As such, the DOL has identified no policy reasons to continue applying restrictive conditions to MEPs in a manner that effectively prohibits open MEPs, especially when such conditions are not required under ERISA.

In fact, the only justification for continuing to apply several of the restrictions contained in the MEP Final Rule appears to be that the conditions are nearly identical to those imposed under the DOL's recently finalized rules on association health plans ("AHPs"). The DOL's argument could very well be that, because the same statutory definition of "employer" in Section 3(5) of ERISA applies in both the retirement and health contexts, the regulatory definitions should not differ. And, having the same structure promotes "simplicity and uniformity."[9] However, the DOL has explicitly rejected any notion that the definition of "employer" must or should be consistent in different contexts, as evidenced by the DOL's explicit statement that policy reasons provide the DOL with administrative flexibility to justify treating defined contribution and defined benefit MEPs differently:

The DOL's proposal also would not involve defined benefit plans, in part, because the DOL's view is that such plans raise different policy considerations.[10]

Given this acknowledged administrative flexibility, why should defined contribution MEPs be required to adhere to rules designed for AHPs? The potential to broaden retirement plan coverage through the greater use of MEPs should not be

[8] 83 Fed. Reg. 53,544.

[9] *Id.* at 53,538.

[10] *Id.* at 53,536.

constrained due to the imposition of restrictions that were designed to address the very different policy concerns that exist in the health insurance context, including policy concerns that vary based on considerations such as whether health insurance is offered in the small group or large group context. However, we do not intend to imply any view on the current AHP rules; on the contrary, this letter does not address issues related to AHPs.

The DOL Should consider allowing defined benefit open MEPs.

In addition to facilitating defined contribution open MEPs, we ask that the DOL also consider permitting defined benefit open MEPs. The DOL stated in the preamble to the MEP Proposed Rule that the proposal (and, consequently, the MEP Final Rule) did not involve defined benefit plans in part because "the DOL's view is that such plans raise different policy considerations."[11] However, the DOL failed to describe what those different policy considerations are that justify the omission.

To further justify excluding defined benefit open MEPs, the DOL also noted in the MEP Proposed Rule that, according to the Government Accountability Office ("GAO"), "sponsorship of MEPs 'seems to be following the general trend away from traditional benefit plans and towards defined contribution plans.'"[12] It is unclear how the GAO's findings support the exclusion of defined benefit open MEPs from the MEP Final Rule and from consideration under this RFI. Is the DOL indicating that it supports this trend of employers moving away from defined benefit plans? Or does the DOL take the position that there is no need to provide guidance that helps slow this trend by easing the burdens of offering or participating in a defined benefit MEP?

The omission of defined benefit open MEPs from the MEP Final Rule and the RFI is further concerning when considering the DOL's very clear preference for "simplicity and uniformity in regulatory structure."[13] Certainly defined benefit and defined contribution MEPs share more policy considerations than AHPs and defined contribution MEPs share. Although we recognize that defined benefit open MEPs would require working through some additional considerations not relevant to defined contribution plans, we nevertheless urge the DOL to consider permitting both defined contribution and defined benefit open MEPs.[14]

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[11] *Id.* at 53,536.

[12] *Id.*

[13] *Id.* at 53,540.

[14] We support the application of improved MEP standards to other types of ERISA-covered benefit offerings of multiple employers, such as life insurance and disability coverage.

A.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? For example, many commenters suggested that banks, insurance companies, broker-dealers, and other similar financial services firms (including pension recordkeepers and third-party administrators) (hereinafter "Commercial Entities") should be recognized for this purpose.

The Council strongly recommends that the DOL recognize Commercial Entities, as defined in Question A.2, as being capable of being an "employer" for purposes of establishing and maintaining an open MEP. Section 3(5) of ERISA defines "employer" in part as "*any* person acting…indirectly in the interest of an employer." The use of the word "any" in the statute is a clear indication that, absent a specific exclusion, Congress intended for the scope of persons that could be an "employer" under ERISA to be essentially without limit as long as the person is acting directly as an employer or indirectly in the interest of an employer. As such, there is no statutory basis for unnecessarily narrowing who can act in the interest of an employer. On the contrary, *any* person who acts indirectly in the interest of an employer should be recognized as capable of being an "employer" under ERISA, including Commercial Entities for purposes of establishing and maintaining an open MEP.

The condition in the MEP Final Rule that generally prohibits a "bona fide" group or association of employers from being a Commercial Entity, or from being owned or controlled by a Commercial Entity or any subsidiary or affiliate of such entity, appears to have no purpose, especially when considered in conjunction with the other requirements. There is no policy reason to prohibit Commercial Entities from serving as an organizer or catalyst to creating and maintaining an open MEP. In addition, the exclusion of Commercial Entities in this regard serves no purpose in addressing the DOL's concern that it is not regulating non-employment-based arrangements that are not subject to ERISA.

Allowing Commercial Entities to play a role in the sponsorship or organization of an open MEP would remove a key existing barrier to the development of a more robust and competitive MEP marketplace that will expand retirement plan coverage to more workers.

A.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? To what extent could a Commercial Entity that sponsors the open MEP affect its own compensation or the compensation of affiliates or related parties through its actions as a sponsor, fiduciary, or service provider to the plan? What categories of fees and compensation, direct or indirect, would Commercial Entities, affiliates, and related parties likely receive as a result of sponsoring the MEP, rendering services to the MEP, or offering investments (including proprietary products) to the MEP? How could these or other such conflicts of interest be appropriately mitigated? How effective would the suggested conflict-mitigation approaches likely be in safeguarding MEPs from conduct that favors the interests of the Commercial Entity, affiliates, or related parties at the plan's expense? Would prohibited transaction exemptions be necessary to avoid violations of Section 406 of ERISA and imposition of excise taxes under Section 4975(c) of the Internal Revenue Code? Are different mitigating provisions appropriate for different Commercial Entities, and why or why not?

We are continuing to study this issue and gather information from our members.

A.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. As another example, in the case of a bona fide PEO, the regulation contains the substantial employment functions and control requirements. Are limiting principles or conditions needed in the case of open MEPs? Please explain why or why not. If such principles or conditions are necessary or helpful, please provide examples of principles or conditions that would be appropriate limitations along with reasons for such limitations.

The Council believes that the following requirements, which are currently imposed on ARPs, should *not* be imposed on open MEPs: (1) the substantial business purpose requirement; (2) the commonality of interest requirement; (3) the control requirements; and (4) as discussed in more detail in our response to Question A.2 above, the prohibition on Commercial Entities from establishing and maintaining the MEP.[15] These requirements have no basis in the statute and serve no policy purpose.

The Council, on the other hand, believes that the following three conditions, which are a subset of the requirements that are currently imposed on bona fide group and association MEPs, would be appropriately applied to open MEPs and would help fulfill

[15] DOL Reg. § 2510.3-55(b)(1)(i), (iv), (v), (vii).

ERISA's statutory intent that ERISA-covered plans be limited to the employment context:

- **Employer members act directly as employer:** We recommend requiring that each employer that participates in an open MEP must act directly as an employer of at least one employee who is a participant covered under the plan. This requirement very appropriately helps to distinguish employer-based arrangements from those that are not by requiring an employment connection with respect to each member participating in the open MEP.

- **Formal organizational structure:** We recommend that the person who establishes and maintains the open MEP, together with the participating employers, have a formal organizational structure or other similar indications of formality and institute procedures that are sufficient for the proper administration of the plan. This condition could include the requirement that the governing documents provide a mechanism for the group to act (with respect to plan amendments, for example) through a designated entity or entities.

- **Restriction on plan participation:** We recommend that the DOL prohibit the person who establishes and maintains an open MEP from making plan participation available to anyone other than the employees and former employees of the employer members (and their beneficiaries). This requirement would also help to ensure that the MEP is an employment-based arrangement.

A.5. Commenters offered two distinctly different approaches on how the current regulation could be reformulated to facilitate open MEPs. For example, some commenters recommended amending the bona fide group or association provisions by deleting the commonality and control requirements, and the prohibition on Commercial Entities. Other commenters, by contrast, recommended modifying the bona fide PEO provisions to cover Commercial Entities, but with additional or different criteria to reflect the differences between PEOs and these other entities. What are the benefits and drawbacks of each of these approaches, and are there other approaches or alternatives the DOL should consider?

As described in our response to Question A.4 and as discussed in more detail in our comments on the MEP Proposed Rule, the Council believes that a straightforward approach to providing for open MEPs in the DOL's regulations would be to simply eliminate the unnecessarily restrictive requirements on bona fide groups and associations of employers that have no basis in the statute. In other words, to allow for open MEPs, we recommend (1) eliminating from the regulation the substantial business purpose, commonality of interest, and control requirements, and (2) lifting the

prohibition on Commercial Entities. The remaining rules under Section 2510.3-55(b) would then need only modest revisions to clarify their application to open MEPs.

A.6. If the DOL took either approach described in the prior question, what would the impact be on MEPs offered by existing groups or associations of employers or by existing PEOs? Is there a risk that open MEPs, under either approach, would undermine or destabilize these existing arrangements? For example, would nationwide open MEPs undermine or destabilize geography-based MEPs sponsored by groups or associations? If so, what steps could the DOL take to mitigate such impacts? For instance, commenters on the Proposed Rule suggested that bona fide group or association MEPs should be permitted to cover regions larger than the boundaries of a single State or metropolitan area that includes more than one State.

If the DOL takes the approach that we recommended in our responses to questions A.4 and A.5 above, which generally consists of removing those requirements from a bona fide group or association MEP that effectively and unnecessarily prevent open MEPs under the DOL's current regulations, then the result would be that the same conditions and requirements would apply to both group or association MEPs and open MEPs. For example, under this approach, the regulation would allow for both nationwide open MEPs and nationwide group or association MEPs. This approach would not undermine bona fide group or association MEPs or place them at an unfair disadvantage. It would, however, likely increase competition – on a level playing field – which we believe is a desirable outcome for employers and employees.

A.7. Some commenters raised concerns about the potential cost and complexity arising from the application of the various qualification requirements under Section 401(a) of the Code (e.g., nondiscrimination, exclusive benefit, minimum participation, minimum coverage, and top-heavy requirements) to the potentially large numbers of employers that theoretically could participate in a nationwide open MEP. These commenters are concerned that the cost and complexity of these requirements in this context may offset some of the savings otherwise associated with establishing and maintaining an open MEP. Are these commenters correct? If so, do the potential costs and complexities outweigh the benefits of offering open MEPs?

The Council believes that any potential concerns over cost and complexity with respect to open MEPs are concerns that are best left for the market to resolve. In many cases, we expect that small and mid-sized employers in particular will, upon evaluating their plan options (including the option to not offer a plan), determine that the economies of scale and other savings that can be realized through a MEP will make choosing to join a MEP the best option for their business. If, however, a particular MEP

becomes too complex and/or too costly, employers will simply choose an alternative (or choose to leave the MEP).

That being said, we do not believe that the concerns that have been raised over the potential cost and complexity of nationwide open MEPs are warranted or outsized in comparison to analogous plans. For example, a group or association MEP that includes employers spanning the entire state of California or the New York City metropolitan area will face no less potential complexity than a nationwide open MEP in terms of the variety and sizes of employers that could be involved. Yet, the DOL currently allows for California-wide and New York City metropolitan-wide group or association MEPs under the MEP Final Rule. As another example, we expect that the cost and complexity concerns with respect to nationwide open MEPs are functionally equivalent to those that potentially exist in the pre-approved plan context, but, given the popularity of pre-approved plans, those concerns have either not materialized or have been successfully mitigated. Regardless, if the cost or complexity of participating in a large open MEP ever becomes greater than what a participating employer is willing to bear, the employer can always exercise ultimate "control" in deciding to offer a separate plan to its employees.

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Thank you for your consideration of our response to the RFI. Should you have any questions or wish to discuss our comments further, please contact me at (202) 289-6700 or by email at ldudley@abcstaff.org.

Sincerely,

Lynn D. Dudley
Senior Vice President, Global Retirement and Compensation Policy