AMERICAN RETIREMENT ASSOCIATION
Working for America's Retirement

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October 29, 2019

Mr. Joe Canary, Director
Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210
Submitted via www.regulations.gov

**Re: Request for Information Regarding "Open MEPs" and Other Issues Under Section (3)(5) of ERISA**
**RIN 1210-AB92**

Dear Mr. Canary:

The American Retirement Association ("ARA") is writing to provide comments with respect to the Request for Information[1] ("RFI") regarding the definition of "employer" in section 3(5) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), in particular, on whether the Department of Labor ("DOL") should amend the regulations thereunder to facilitate the sponsorship of single defined contribution retirement plans maintained on behalf of multiple unrelated employers ("Open MEPs").

The American Retirement Association is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America's private retirement system, the American Society of Pension Professionals and Actuaries ("ASPPA"), the National Association of Plan Advisors ("NAPA"), the National Tax-Deferred Savings Association ("NTSA"), the ASPPA College of Pension Actuaries ("ACOPA"), and the Plan Sponsor Council of America ("PSCA"). ARA's members include organizations of all sizes and industries across the nation who sponsor and/or support retirement saving plans and are dedicated to expanding on the success of employer sponsored plans. In addition, ARA has more than 25,000 individual members who provide consulting and administrative services to the sponsors of retirement plans. ARA's members are diverse but united in their common dedication to the success of America's private retirement system.

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[1] "Open MEPs" and Other Issues Under Section (3)(5) of the Employee Retirement Income Security Act, 84 Fed. Reg. 37545 (July 31, 2019).

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ARA and its underlying affiliate organizations have long been supportive of initiatives to improve the private retirement system. Expanding access to workplace retirement plans has been a part of ARA's mission since its inception more than 50 years ago. We have engaged with both Congress and federal regulators to reduce the barriers to plan sponsorship, particularly with regard to small businesses.

ARA was pleased to provide comments on DOL's October 23, 2018, Notice of Proposed Rulemaking, in which we expressed the view that reducing the barriers to plan sponsorship, particularly with regard to small businesses is a positive development in expanding retirement plan coverage for working Americans. The ARA believes that Open MEPs hold the potential to increase efficiencies, manage costs more effectively, reduce burdens on employers, and improve retirement outcomes for the American workforce. We appreciate the opportunity to respond to DOL's request for further comments on a broad range of issues related to Open MEPs and provide for your consideration the following.

## Responses

### 1. Should DOL amend 29 CFR 2510.3-55 to expressly permit financial institutions or other persons to maintain an Open MEP?

The most effective means of supporting the overarching policy goal of expanding access to workplace retirement savings plans is to increase sponsorship opportunities for retirement plans that cover employees of more than one employer ("MEPs"). In this regard, the ARA supports amending of 29 CFR section 2510.3-55 to expressly permit financial institutions to maintain Open MEPs. While we agree that financial institutions acting in their capacities as service providers are not "employers" with respect to a pooled plan, for these purposes, we believe that a service provider should be permitted to act as the plan sponsor. Doing so, the service provider acts "indirectly in the interest of an employer in relation to an employee benefit plan."[2] In addition, many employers, particularly small employers, have concerns that retirement plans are costly and confusing to operate. Having a financial institution as sponsor would meaningfully mitigate these concerns. Currently, many financial institutions routinely handle day-to-day plan administration duties for existing clients, making it more cost-effective for them to handle aspects of the plan. This often includes access to funds and share classes typically not available to small employers. Financial services companies have scalable business models well-suited to Open MEPs, which would result in competitive pricing in the market.

[2] ERISA sec. 3(5).

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**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?**

Though the meanings of acting "directly as an employer" or "indirectly in the interest of an employer" is not made clear in the statute, the ARA believes that there should not be restrictions on the type of commercial entities (e.g., banks, insurance companies, pension recordkeepers, and TPAs) that may be treated as an "employer" under the "indirectly in the interest" clause. ARA believes that this is entirely consistent with DOL's public policy goals. Moreover, we think that view is supported by the statute. Under Section 3(5), "employer…includes a group or association of employers acting for an employer in such capacity." The term "includes" is commonly understood to connote a part of a whole not the whole. We do not think that Congress sought to restrict plan sponsorship to "groups or associations of employers" by implying that "includes" defines a limited category. In our view, the DOL may interpret plan sponsorship under section 3(5) more broadly than simply including "groups or associations or employers" or "professional employer organizations." Indeed, in connection with the DOL's final rule on association health plans, the DOL described the scope of its own authority under section 3(5), stating that "neither the Department's previous advisory opinions, nor relevant court cases, foreclose the Department from adopting a more flexible test in a regulation, or from departing from particular factors previously used 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." It stands to reason that this same rationale applies in the context of retirement plans.

**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?**

Like many service providers to plans, commercial entities may have conflicts of interest with respect to their plan clients. Indeed, similar conflict-of-interest concerns currently exist with professional employer organizations ("PEOs"), which have been operating as sponsors of

MEPs for some time. Prohibited transaction relief will be required, including for conflicts of interest that may arise with a service provider that offers products in conjunction with MEP sponsorship. For example, in addition to the fundamental service provider prohibited transactions, conflicts for commercial entities would occur relating to the types of fees applied and compensation received by the commercial entity, as well as use of propriety products and investments. Prohibited transaction exemptions, including under ERISA 408(b)(2), will mitigate many of these conflicts. Other potential conflict mitigation strategies include the service provider's policies and procedures, which should be intended to minimize conflicts, as well as compensation structures which do not incent imprudent actions.

Just as important, ARA believes it is important that DOL exercise an oversight role with regard to MEP providers. The Executive Order[3] directing DOL to consider issuing guidance to make it easier for small and mid-size businesses to participate in MEPs specifies that any guidance should include "appropriate safeguards." The DOL has broad authority under ERISA section 103 with regard to service provider information required in a plan's annual report. The Form 5500 should solicit sufficient information so that the MEP providers' activities can be adequately monitored by both the DOL and by participating employers. As observed in the preamble to the Proposed Rule, most MEPs are likely to be large plans, subject to the independent audit requirement and will provide more detailed information on the Form 5500 as a result. The DOL should closely monitor the annual reports filed by Open MEPs and exercise the DOL's broad authority to conduct investigations and audits of Open MEP service providers to protect plan participants from fraud and abuse.

**4. Are limiting principles or conditions needed in the case of open MEPs?**

ARA believes that extending the availability of MEPs is a positive development in expanding retirement plan coverage for working Americans. In generall, we also believe that any company that meets all of the requirements should be permitted to sponsor a MEP. That said, certain conditions on providers of Open MEPs are appropriate. The SECURE Act includes examples of appropriate and reasonable controls, including that the provider is a person: designated by the terms of the plan as a named fiduciary, as plan administrator, and as the person responsible to perform all administrative duties; that registers with the DOL as a pooled plan provider and provides any other information that the DOL requires, before beginning operations as a pooled plan provider; acknowledges in writing its status as a named

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

fiduciary and as the plan administrator; and is responsible for ensuring that all persons who handle plan assets or are plan fiduciaries satisfy ERISA's bonding rules.

ARA also believes that employers should be adequately informed regarding the structure of Open MEPs and how they differ from other pooled arrangements and single employer plans. In other words, employers should be provided salient information about pooled plans upon entering or considering entering a pooled arrangement.

Additionally, we would like to emphasize that it is essential that the DOL exercise an oversight role with regard to MEP providers, consistent with the SECURE Act conditions and the Executive Order instruction that Open MEP guidance include "appropriate safeguards." Moreover, participating employers should still be expected to exercise due diligence in the process of selecting and monitoring a MEP provider. Employer oversight is critical for protecting the interests of plan participants. Additionally, until such time as Congress changes the statutory languages, limiting principles or conditions on Open MEPs must harmonize with the current statute.

**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 Department should consider?**

ARA suggests that the DOL consider maintaining the two approaches under the current regulation—for bona fide groups or associations and bona fide PEOs—and add a third group for commercial entities which sponsor Open MEPs. Commercial entities, such as recordkeepers, can currently act as plan sponsors, plan administrators, and recordkeepers. They could easily move into the role of plan sponsor as well, as discussed in our response to Question 1. This approach would permit the DOL to remain consistent with its own guidance and create guidelines and safeguards tailored to commercial entities that act as sponsors of Open MEPs. Altogether, the availability of these approaches would further close the coverage gap, by broadening access to employer-sponsored plans.

**6. If the Department 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**

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**open MEPs undermine or destabilize geography-based MEPs sponsored by groups or associations? If so, what steps could the Department 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. Are these commenters correct? Why or why not?**

Beyond affirming our support of fairness and competition in the market and providing a broad range of opportunities for market participation, ARA declines to respond to this question as it would require us to speculate on unknown impacts.

**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?**

In the macro sense, competition in the marketplace ultimately will determine whether Open MEPs are economically viable. the DOL and the IRS play a key role in mitigating the costs and complexities with respect to open MEPs. But if the goal is to increase retirement plan coverage, we should allow the marketplace to innovate toward cost effective ways to establish and maintain Open MEPs.

A MEP offers several advantages for employers, especially smaller to mid-sized employers, and their employees. First, by commingling assets, a MEP may achieve the economic presence to obtain lower investment and administrative fees, better investment opportunities, top-shelf service providers, and add-ons like financial education and advice. Second, a MEP offers employers a simplified, turnkey process for obtaining a plan document, selecting and monitoring the investment platform and the recordkeeper, IRS reporting, obtaining an independent audit, and similar chores. As a MEP, one IRS Form 5500 Annual Report is filed, one ERISA fidelity bond purchased, and a single annual audit by an independent accountant conducted for the entire plan. Finally, by outsourcing much of the burden to the MEP sponsor and its outside experts, employers can significantly minimize their exposure to possible ERISA liability generally – on matters such as whether to join, remain in, or leave the plan.

**8. Would a regulation facilitating the adoption and marketing of Open MEPs by Commercial Entities have an impact on the implementation, administration, or**

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**enforcement of any State or federal laws, apart from ERISA and the Internal Revenue Code, particularly including securities, insurance, and banking laws? Are there any specific issues relating to such other laws, which the Department should consider in connection with any rulemaking effort?**

To the best of our knowledge, a regulation facilitating Open MEPs, does not interfere with, conflict with, or otherwise impact the implementation, administration, or enforcement of any State or federal laws, including securities, insurance, and banking laws. ARA is aware of other areas of law where practitioners have raised questions in the past about MEPs, but these questions are for regulators other than the DOL. ARA does not see the need for comment in the absence of overlap with matters under DOL's jurisdiction.

We note that some commentators have opined that the definition of "single plan" should be the same for both ERISA and the Code, but ARA believes the statutes are very different and that attempting to create a unified definition would be problematic.

**9. Should the Department amend 29 CFR 2510.3-55 to address "corporate MEPs," and if so, why and how? Apart from the definition of a controlled group of corporations within the meaning of section 414(b) of the Code, (or a group of trades or businesses under common control within the meaning of section 414(c) of the Code), is there a precise level of common ownership that could and should be used to deem two or more corporations, trades, or businesses to have sufficient ownership ties such that any one of these corporations, trades, or businesses can be said to be able to act "indirectly in the interest of" the others within the meaning of ERISA section 3(5) to sponsor a MEP for the group's participation? Are there aspects of control or commonality that the Department should consider in addition to the precise level of common ownership? Put another way, if the Department were to consider facts and circumstances, either in addition to, or in lieu of, level of common ownership, what facts and circumstances would be appropriate to consider? Also, what sufficient ties are needed for two or more tax-exempt organizations or a tax-exempt organization and another organization to be treated as an employer within the meaning of section 3(5) of ERISA?**

As the ARA has previously commented, one area of concern is with regard to so-called "corporate MEPs," a MEP sponsored by a group of employers related by ownership but at a common ownership level insufficient to constitute a controlled group or affiliated service group under the Internal Revenue Code. Corporate MEPs are the most common form of MEP today, and the DOL, to our knowledge has not appeared to question the "bona fide" status of the groups of employers participating in such a MEP.

The ARA recommends that employers who share common ownership as a result of a merger, acquisition or divesture or other circumstance that involves a substantial economic, or

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representational purpose unrelated to the provision of benefits to the employees of separate employers be treated as having a commonality of interest sufficient to sponsor a MEP. In such circumstances, other "control" structures should be permitted as long as one or more of the participating employers assumes the role and responsibilities required of a plan sponsor.

Current regulatory initiatives to make it easier for employers to participate in MEPs might obviate the need for corporate MEPs. However, regulatory clarity would be helpful. In addition, the DOL and IRS should work together on guidance for Open MEPs and corporate MEPs.

**10. Should members of an "affiliated service group" within the meaning of section 414(m) of the Code be treated as an employer within the meaning of section 3(5) of ERISA? If so, why?**

The ARA believes that members of an affiliated service group (ASG) within the meaning of Code section 414(m) should be treated as an "employer" under section 3(5) of ERISA. ASGs are more closely connected than unrelated members of associations retirement plans, sharing a stronger commonality consistent with the single employer rule and should be treated as having sufficient ties "such that any one of these corporations, trades, or businesses can be said to be able to act 'indirectly in the interest of' the others within the meaning of ERISA section 3(5) to sponsor a MEP for the group's participation." Moreover, treating ASGs as "employers" under section 3(5) would better coordinate DOL rules with the Code, where ASGs are treated as single employers. ARA believes this degree of harmonization would be more understandable to small employers, facilitating overall compliance.

We wish to thank this Department for the opportunity to provide our responses. ARA looks forward to working with the DOL on this initiative. We would welcome the opportunity to discuss these comments with you further. Please contact Will Hansen, Chief Government Affairs Officer, at (703) 516-9300 or at WHansen@usaretirment.org if you have any questions. Thank you for your time and consideration.

Sincerely,

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Executive Director/CEO
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