The SPARK Institute, Inc.
SHAPING AMERICA'S RETIREMENT

October 29, 2019

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

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

Dear Sir or Madam:

The SPARK Institute Inc. appreciates the opportunity to comment on the Department of Labor's ("the Department's") request for information ("RFI") on open multiple employer plans ("open MEPs"). The SPARK Institute has long supported the expansion of MEPs as a means to increase coverage and reduce the costs associated with employment-based retirement savings options. Our comments on the Department's RFI are similar to the comments we provided in response to the proposed version of the Department's recently finalized Association Retirement Plan ("ARP") regulations. **In this regard, the SPARK Institute continues to urge the Department to use its regulatory authority to permit truly open MEPs that can be sponsored by financial services firms.**

The SPARK Institute represents the interests of a broad-based cross section of retirement plan service providers and investment managers, including banks, mutual fund companies, insurance companies, third party administrators, trade clearing firms, and benefits consultants. Collectively, our members serve approximately 95 million employer-sponsored plan participants.

The SPARK Institute believes that retirement policy should make it easier – not harder – for small employers to offer retirement plans. We believe that the greater availability of MEPs would help expand retirement plan coverage, especially for small businesses, because of the reduced costs and economies of scale that are made possible by MEPs.

The SPARK Institute commends the Department for recently publishing regulations that will expand the types of associations that can sponsor a MEP and for clarifying the circumstances under which a professional employer organization ("PEO") can sponsor a MEP. However, that guidance does not go far enough. As further explained below, the SPARK Institute believes that the Department should further eliminate barriers to MEP participation by permitting financial services firms to sponsor MEPs, removing the "limiting principles" that currently restrict greater MEP participation, and working with other regulators to reduce any MEP barriers that are beyond the Department's jurisdiction.

I. THERE IS NO REASON FINANCIAL INSTITUTIONS CANNOT SPONSOR MEPS

The Department's RFI asks whether the Department should amend its existing regulations to permit financial institutions to maintain a defined contribution MEP. At the outset, it is important to make clear that rather than discouraging financial institutions from being involved with employee benefit plans, the Employee Retirement Income Security Act ("ERISA") actively encourages financial institutions to serve as fiduciaries for plan investments and administration. In fact, Congress repeatedly gave financial institutions special status under ERISA.[1] We are not aware of a single section of ERISA, nor any piece of legislative history, that suggests financial institutions are prohibited from sponsoring employee benefit plans. We strongly object to any suggestion that financial institutions, including retirement plan recordkeepers, banks, investment managers, and life insurance companies are fundamentally unqualified to sponsor a MEP.

As explained in our comments below, the SPARK Institute strongly disagrees with the Department's existing restriction for financial institutions because: (1) it is unsupported by the text of ERISA; (2) it does not provide any meaningful benefits or protections that are not otherwise addressed by ERISA; and (3) it unfairly discriminates against financial services firms, as opposed to other commercial entities that are currently permitted to sponsor MEPs. If a financial services firm is willing to act as the plan sponsor and administrator, and acknowledge its fiduciary status under ERISA in writing, we do not see any legal or policy justifications for limiting the ability of financial services firms to sponsor a defined contribution MEP.

ERISA Does Not Limit Financial Services Firms. Existing guidance from the Department explains that ERISA requires employee benefit plans to be established or maintained by an "employer." Thus, the critical question for determining whether an entity can sponsor a MEP is whether such entity can be treated as an "employer" under ERISA.

Uniquely, ERISA does not limit the term "employer" to its traditional common law notions. Instead, ERISA broadly defines an employer to include a "person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." Thus, any person that acts *indirectly in the interests* of an employer in relation to an employee benefit plan is considered an employer. This includes a "group or association of employers acting for an employer in such a capacity," but is not limited to such a group or association. In short, the minimum needed for an entity to be considered an "employer" is that the entity: (a)

[1] *See e.g.*, ERISA §§ 3(38); 401(b)(1); 401(b)(2); 402(c)(2); 408(b)(4); 408(b)(5); 408(b)(6); 408(b)(8); 408(g)(11)(A), all of which give privileged status to financial institutions.

acts indirectly in the interest of an employer; and (b) does so in relation to an employee benefit plan.

While every service provider, including a financial services firm, is not automatically an "employer" with respect to the plans it supports, nothing in ERISA prohibits a service provider from being treated as an "employer" by agreeing to take on the role of a plan sponsor.[2] And if a financial institution agrees to act as plan sponsor and administrator, and acknowledges fiduciary status in writing, then it is perfectly correct to say that the service provider is "acting indirectly" for the employer in relation to the plan. In fact, that is the most natural conclusion to draw from the plain language of the statute. Thus, we strongly urge the Department to remove the restriction on financial services firms, as it is unsupported by a plain reading of ERISA.

No Meaningful Benefits or Protections. The Department's current restriction on financial services firms – through its interpretation of the term "employer" – does not provide any meaningful benefits or protections that are not otherwise addressed by ERISA's fiduciary, reporting, and disclosure rules. For instance, the Department has never asserted that ERISA's overarching regulation of employee benefit plans fails to protect small employers who engage one-on-one with financial services firms to offer their employees retirement benefits. In that context, ERISA's fiduciary, reporting, and disclosure rules provide employers and participating employees with all of the benefits and protections envisioned by Congress when it enacted ERISA. By comparison, we do not see any reason why those otherwise applicable benefits and protections would be any less effective or comprehensive when a financial services firm engages with a small employer that has pooled together with other employers to offer retirement benefits through a MEP, especially when the financial services firm agrees to act as a plan sponsor and administrator, and agrees to fiduciary status in writing.

Current Restrictions Unfairly Discriminate Against Financial Services Firm. The Department's current interpretation of ERISA already permits commercial entities, other than traditional employers, to sponsor a MEP; namely bona fide groups or associations of employers and PEOs. These associations and PEOs, like financial services firms, have their own unique interests that do not necessarily align with their members' or clients' interests in all cases. ERISA's prohibited transaction rules provide a comprehensive scheme of regulation to address these conflicts by prohibiting certain transactions with parties in interest and preventing fiduciaries from self-dealing. Congress certainly contemplated that financial services firms would act as fiduciaries, subject to ERISA's prudence and prohibited transaction rules, and as explained above, we see nothing in the text of ERISA that prevents them from also acting as a plan sponsor. Accordingly, the SPARK Institute is skeptical of any purported rationale that would generally treat financial services firms any differently than the associations and PEOs that can already sponsor a MEP.

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[2] The only justifications the Department gave in the Association Retirement Plan regulations for retaining the restriction, despite multiple comments to the contrary, were: (a) there was a similar restriction in the Association Health Plan regulation prohibiting health insurance companies from being treated as a bona fide group or association; and (b) applying a similar understanding of "group or association" in the pension context promotes simplicity and uniformity of regulatory structure. We believe that there are many reasons to treat pension plans, especially defined contribution plans, differently than health plans.

Moreover, despite any potential concerns from the Department regarding financial services firms, we would point out that small business owners generally do not share these concerns. According to a 2019 study sponsored by the SPARK Institute, 89% of respondents indicated a high level of trust in financial services firms to administer financial assets and retirement savings programs. **Notably, small businesses ranked their trust for financial services firms higher than their trust for employer associations and government entities**.[3]

Prohibited Transaction Relief. The Department's RFI specifically asks about the conflicts of interest that arise when commercial entities sponsor a MEP and asks whether prohibited transaction exemptions would be necessary to avoid violations of the prohibited transaction rules. As explained in the preceding paragraph, conflicts already exist for *any* commercial entity that sponsors a MEP. But this is nothing new – every employer that sponsors a plan faces a variety of conflicts every day in its administration of its employee benefits plans. Fiduciary committees staffed by full-time employees of the plan sponsor routinely face administrative decisions that might conflict with the interests of the plan sponsor. In fact, most decisions to grant a benefit claim ultimately mean a plan sponsor must pay for the benefit.

We do not think that the ERISA's prohibited transaction rules would apply any differently to financial services firms if they are permitted to sponsor a MEP. It is true that financial services firms are more likely to face issues involving affiliates that might provide services or investments to the plan. Those circumstances, however, are not new and they are not categorically prohibited by ERISA. Financial services firms are eager to design products that fit within ERISA's existing prohibited transaction exemptions, and if necessary, request individual and class exemptions, which over the years the Department has granted if it finds an exemption to be administratively feasible, in the interests of the plan and its participants, and protective of the rights of participants.[4]

A number of SPARK members pointed out that, to truly make MEPs cost effective and workable, they may need to use affiliated investments and bundled services. Depending on the arrangement, existing class exemptions may suffice, or additional exemptions may be needed. We encourage the Department to be open to these requests, with the mindset that the goal is to bring more small employers into the retirement system. ERISA's standards for granting exemptions, including that it must be protective of the rights of participants, would and should be the Department's guiding principle. However, the Department's progress on any project to expand MEPs should not be delayed to address a variety of exemptions that may be needed as providers develop market-based solutions.

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[3] Press Release: Cerulli Associates, *Small-Business Owners Report Greater Trust in Financial Services Companies over Associations or Government Entities to Provide Retirement Plans* (April 1, 2019), available at: https://www.cerulli.com/about-us/press/2019-april-sparkcerulli-white-paper/.

[4] ERISA § 408(a).

II. PERMIT TRULY OPEN MEPS WITHOUT REGARD TO "LIMITING PRINCIPLES"

The RFI asks whether the "limiting principles" imposed by the Department's current guidance are necessary for defined contribution MEPs. In the case of ARPs, these limiting principles generally require: (1) the association to be controlled by its employer members; (2) the association to have at least one substantial business purpose unrelated to benefits; (3) the association to not be a financial service firm; and (4) the employer members of the association must have a "commonality of interest." In the case of PEOs, these limiting principles generally require the PEO to perform "substantial employment functions" on behalf of participating employers.

As explained in more detail below, the SPARK Institute believes that the Department should eliminate these "limiting principles" in the context of defined contribution MEPs because they inhibit greater MEP expansion, are not supported by the text of ERISA, and are not justified by any meaningful benefits or protections for employers and employees. Instead, the Department should allow unrelated employers to participate in truly open MEPs that are made available nationwide.

Limiting Principles Prevent MEP Expansion. The SPARK Institute recognizes that MEPs sponsored by employer associations and PEOs provide excellent benefits and services to their members and clients. In the case of ARPs, we know that employer associations can help their members by making available offerings that are uniquely tailored to the particular needs of their members. In the case of PEO MEPs, we know that PEOs can simplify their clients' responsibilities as employers so clients can focus on running their businesses.

At the same time, however, we also recognize that there is a need to reach employers that do not actively engage with an employer association and do not utilize the services of PEOs. And to reach that class of small employers in a way that is cost-effective for service providers, the Department must remove the limiting principles that exist in the current regulations. Not only would such an action create a new channel for small employers that do not engage with an employer association or PEO, it would also create greater competition and choice for all small employers; and as a market force, that competition and choice would increase efficiencies and lower costs for participating employers and employees. Accordingly, we urge the Department to permit truly open MEPs without regard to the limiting principles described in its existing regulations.

ERISA Does Not Limit MEP Sponsorship to Associations and PEOs. As already explained above, ERISA broadly defines the types of employers who can establish or maintain a plan as any "person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." This *includes* a "group or association of employers acting for an employer in such a capacity," but is not limited to such a group or association.

Similar to our explanation for why ERISA does not prevent financial institutions from acting "indirectly in the interest of" an employer, we do not think that the Department's other limiting principles for ARPs or PEO MEPs are necessary for a service provider to act "indirectly in the interest" of an employer. Accordingly, the SPARK Institute believes that the Department should use its regulatory authority to permit unrelated employers to join together through a MEP on a nationwide basis, without regard to any affiliation or relationship to an employer association or PEO, because ERISA does not call for these restrictions.

Limiting Principles Are Unnecessary. The Department's limiting principles are unnecessary in the context of defined contribution MEPs. As explained above, ERISA's fiduciary, disclosure, and reporting rules provide benefits and protections to employers and employees without regard to the Department's narrow interpretation of ERISA's "employer" definition. Unlike health plans and defined benefit retirement plans, individual participants in a defined contribution MEP are only eligible to receive benefits that are tied to their individual accounts. Thus, any protections that may be justified in the context of defined benefit plans and health plans are not relevant to defined contribution MEPs. We recognize that the Department strives to consistently interpret ERISA across different types of plans. However, we do not believe the Department should do so when it impedes sound public policy and is not otherwise restricted by the text of ERISA.

Moreover, it is not clear what the Department's limiting principles are trying to achieve in the context of defined contribution MEPs. For example, consider the Department's revised "commonality of interest" requirement for ARPs. Consistent with that requirement, unrelated employers located in the same state can participate in a MEP sponsored by a local chamber of commerce. We do not understand what benefits or protections are being added through this restriction, which would allow unrelated employers in Sacramento and San Diego to join together through a MEP, but presumably would not permit cooperation between unrelated employers in Detroit and Cleveland.

Working Owners. The Department's current guidance on ARPs includes an important rule that permits working owners of a trade or business without common law employees to qualify as both an employer and an employee of the trade or business if certain requirements related to hours worked or the amount of wages or income are met. The SPARK Institute believes that this is an important development in the Department's interpretation of ERISA and believes that this will help workers in the gig economy gain access to beneficial retirement savings options. Accordingly, the SPARK Institute strongly encourages the Department to ensure that any guidance expanding MEPs will extend this working owner interpretation to any newly permitted arrangements. Working owners, like employees of other small business, should have the ability to participate in a truly open MEP and benefit from the economies of scale that otherwise might not be available in the individual marketplace.

III. IRS SHOULD CONSIDER OPTIONS TO PROMOTE MEP PARTICIPATION

The Department's RFI asks about the potential cost and complexity arising from the application of the various qualification requirements under section 401(a) of the Internal Revenue Code (the "Code") (e.g., nondiscrimination, exclusive benefit, minimum participation, minimum coverage, and top heavy requirements) to nationwide open MEPs.

It is true that existing MEPs face administrative costs that are not borne by single employer plans because MEPs must apply certain tax rules, including the minimum participation and vesting rules, across all participating employers.[5] In addition, the regulations implementing Code section 413 require that each participating employer independently satisfy the requirements of Code section 401(a), including the nondiscrimination rules.[6] Closed MEPs have faced these potential challenges for many years, although they tend to be more significant in the context of defined benefit plan MEPs because defined benefit plans rely more heavily on tracking years of service across all participating employers.

The Department of the Treasury and Internal Revenue Service ("IRS") have proposed a regulation that is intended to address one of the most significant challenges under the Code: the "one bad apple rule." The SPARK Institute was pleased to support that proposal and we would support additional efforts to limit MEP costs and complexity. IRS has broad authority to interpret the nondiscrimination rule in Code section 401(a)(4) and could adopt a variety of safe harbors in the case of MEPs. Further, there is nothing in the text of Code section 413(b) that requires a particular application of the "Average Deferral Percentage" and "Average Contribution Percentage" tests in the case of a 401(k) plan that is a MEP.

IRS could provide that, under certain plan designs, the MEP can perform testing on a plan-wide basis. For example, one design might be that the MEP provides universal availability of elective deferrals (similar to 403(b) plans, which do not need to pass the Average Deferral Percentage test), employer contributions based solely on a percentage of pay, and immediate vesting of any employer contributions. So long as the plan, as a whole, passed applicable non-discrimination tests, the plan would be treated as if each employer passed testing. Without the need for costly employer safe harbor contributions, we believe more employers would be interested in offering a 401(k) plan through a MEP.

We would be supportive of the Department working with Treasury and IRS on reducing these costs. Nevertheless, we must emphasize that the most significant current challenge to getting more small businesses to adopt a MEP is not the tax rules, but the Department's current interpretation of what constitutes a MEP.

A final point here is that Code section 413 is not solely an issue for the Treasury and IRS because ERISA contains a parallel provision, section 210(a). Reorganization Plan No. 4 of 1978 transferred interpretive jurisdiction over 210(a) to the Secretary of the Treasury, but the Department retains the authority to enforce section 210(a), which could be the subject of audits by the Department as part of its oversight jurisdiction over MEPs.

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[5] Code § 413(c).

[6] Treas. Reg. § 1.413(c)-2.

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The SPARK Institute appreciates the opportunity to provide these comments to the Department. If the Department has any questions or would like more information regarding this letter, please contact me or the SPARK Institute's outside counsel, Michael Hadley, Davis & Harman LLP (mlhadley@davis-harman.com or 202-347-2230).

Sincerely,

Tim Rouse
Executive Director