Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5665
U.S. Department of Labor
200 Constitution Avenue, NW.
Washington, DC 20210

Re: Attention: Definition of Employer – MEPs RIN 1210-AB88.

TAG Resources submits this in response to the Department's request for comments on its proposed rule regarding the Definition of "Employer" Under Section 3(5) of ERISA—Association Retirement Plans and Other Multiple-Employer Plans, RIN 1210-AB88, Oct. 23, 2018. We appreciate the opportunity to comment.

TAG is one of the country's leading providers of "aggregated plan services," under which we offer programs which provide the start-up and small plan markets the advantages of scale which is otherwise unavailable to them. These programs include both Multiple Employer Plans for those organizations qualifying as an "employer" under existing DOL guidance related to ERISA Section 3(5) and programs we refer to as "Multiple Employer Aggregation Programs," (or "MEAPs"), which are designed to mimic the most favorable aspects of multiple employer plans ("MEPs") for those plans who are currently not otherwise eligible to participate in a MEP.

In particular, we are responding to the Departments request for comment on whether, and under what circumstances, so-called "open MEPs" or "pooled employer plans," as depicted in the various legislative proposals, could be operated as an employment-based arrangement, as contemplated by ERISA's text. As further described below, we believe that such arrangements should be addressed in this rulemaking.

Summary of Comments

1. The nature and operation of both ERISA 's and the Code's multiple employer plan rules demonstrate that other commercial entities-in addition to PEOs- can similarly act indirectly in the interests of employers in a manner which is consonant with ERISA's structure. The proposed regulation drew from the concern referenced in the Association Heath Plan regulations that "A construction of 'employer' encompassing insurance companies that are merely selling commercial insurance products and services to employers would effectively read the definition's employment-based limitation out of the statute." This otherwise valid policy concern, however, does not arise in the retirement plan context.

   The difference is that a commercial entity which sponsors a MEP acts as an employer, itself, even when acting indirectly on behalf of other employers under Section 3(5). This

means that, unlike the MEWA sponsor, ERISA Section 210(a) imposes on the pension MEP sponsor substantial employment-based obligations. The minimum participation rules under Section 202, the minimum vesting rules under Section 203, and the benefit accrual requirements under Section 204 all apply to the MEP sponsor's own employees (and the hiring of those employees by participating employers). Though the MEP sponsor may choose to not cover their employees under the MEP, ERISA's service rules related to the MEP still will apply to its employees.

Further, the operation of the plan administrator rules under ERISA Section 3(16), 3(21) and the annual reporting rules under Section 103 impose substantial involvement in the employment related practices of the employers upon whose behalf the MEP sponsor is acting. The nature of these functions is, in itself, a substantial employment function.

Finally, sponsoring a MEP means that the MEP sponsor is providing a series of fiduciary services to the participating employers and to the plan. ERISA's fiduciary rules, in particular the prohibited transaction rules, prevent the commercial sponsor from putting its own commercial interests in front of those of the plan or the employers on whose behalf they are indirectly acting. Any commercial entity (including a PEO) which chooses to sponsor a MEP, and which is in a business in addition to providing fiduciary and administrative services to a MEP, must effectively separate their commercial interests from their MEP related interests. For example, a financial services company would be prevented from profiting from its own financial products which otherwise would be made available to the MEP it sponsors.

Therefore, non-PEO commercial entities should be permitted to sponsor MEPs in the same manner, and under the same conditions, as a PEO.

2. The analysis in paragraph #1 supports the position that self-employed persons should be able to participate in a commercial, non-association MEP. This is particularly so because the self-employed person would need to more greatly rely upon the employment and retirement plan expertise of the plan sponsor in order to participate.

Discussion

1. Commercial Entities as Sponsors

    a. A MEP has an employment impact on the sponsor

The concern raised by the Department is that a commercial entity which adopts and controls a MEP will not be consonant with ERISA without it performing a "substantial employment function." This necessarily means that the concern is limited to those entities which have employees, or which is controlled by an entity which has employees, who are engaging in the sponsor's commercial activities.

A commercial business which sponsors a MEP is not engaging in an independent act which is devoid of substantial employment implications. It is not merely the creation of another commercial product with no relation to ERISA. The MEP plan sponsor is an "employer maintaining the plan" under ERISA Section 210(a), and the "controlling member", "plan sponsor" or "lead employer" under the IRS Manual 7.11.7.2 (5-30-2017). This is true whether or it is engaged in any other commercial activity. It is the sponsor which legally adopts the plan; it is treated under the plan document as the plan sponsor; and has all the settlor authorities under which a plan is adopted, maintained and terminated. As noted in the proposed regulation, the MEP sponsor is recognized as the "sponsor' of the plan under ERISA section 3(16)(B).

This means that the MEP sponsor which has employees (as is the case in virtually any commercial business) has no ability to avoid the application of ERISA's rules to its own organization once it decides to take on the mantle of sponsoring a MEP. That sponsoring enterprise would need to decide whether or not any of its own employees would be covered by the MEP. So, for example, a PEO, as the plan sponsor, needs to decide whether or not its own employees would be covered by the MEP it is sponsoring.

However, once it sponsors a MEP, the commercial entity cannot choose the manner in which the participation, vesting and benefit accrual rules apply to its current employees or those employees it will hire. Unlike the employees of a sponsor of a multiple employer welfare plan, the hours accrued by a MEP sponsor's employees are carried with them (using the special break in service rules under 2530.210(f)). A MEP sponsor who hires an employee who had previously worked for an employer which had participated in that MEP must count that person's years of service for purposes of its own plan's participation, vesting and benefit accrual.

A commercial business cannot, therefore, treat the sponsorship of a MEP in the same manner as it would any other of its commercial products. It must take into the account the impact MEP sponsorship has on its own benefit plan design for its own employees.

b. Legal responsibility for maintaining a retirement plan is a substantial employment function

As noted in the proposed regulation, access to workplace retirement plans is "critical," and the operation of a retirement plan impose substantial burdens on the operation of a small business. The Department regularly reminds employers of the importance of this function through its own substantial enforcement activities against plan sponsors.

A MEP sponsor takes on the obligation of fulfilling the regular 3(21) administrative activities in maintaining the plan; the statutory 3(16) obligations; and the annual reporting obligations of the plan under 103-including the responsibility for the annual audit. This also involve maintaining the mundane, settlor functions of a plan which often are responsible for a

significant burden on the small employer. Vetting, retaining, maintaining, monitoring and terminating service vendors to the plan impose substantial employment related burdens which would be normally borne by the participating employer. We also invite the Department to review the administrative terms of any retirement plan, which lays out the depth and breadth of the sponsors involvement with employment related activities.

The Form5500 itself, with its penalty of perjury clause requiring the plan administrator review and attest to the best of its knowledge that the statements therein are true, also involve substantial employee functions, especially when taking into account the compliance questions which must be answered on behalf of each participating employer.

c. Impact of fiduciary and prohibited transaction rules.

A MEP sponsor is a named fiduciary pf the plan, and is responsible for arranging for investment advisors, investment managers, and is typically involved in choosing the investment platform to the plan. A commercial entity which markets investment products, platforms and services which decides to sponsor a MEP cannot use its discretionary authority under the MEP to themselves profit from these decisions. This effectively prevents financial service firms which specialize in providing investment related services to plans from utilizing their commercial products under a MEP it sponsors.

d. A note on PEOs.

We support the approval of PEOs to sponsor MEPs, but not for the reasons that they perform greater "substantial employment functions" than other commercial entities. PEOs, just like any other commercial enterprise, sell their "employment" services because of their own pecuniary interest, not because of any particular business alignment with their customers. The employment services they offer are truly ministerial in nature: it is the employer, not the PEO, which is taking the business risk of hiring employees; identifying what type and how many employees are needed to run their business; laying out the tasks employees should do in the furtherance of the business; setting the employees' salaries and benefit level; and deciding upon the conditions of employment. It is the burdensome "non-business" employment infrastructure matters for which a PEO is hired: obtaining workers compensation insurance; maintaining compliant employment practices; maintaining employment manuals and assisting the employer in the complying with all of the various state and federal wage and labor laws. The PEO's financial stake is in its own business, not in their clients. In fact, the original "open mep" movement was created to assist PEOs who did not have the specialized capabilities to sponsor MEPs on their own.

The reason a PEO operation should qualify to be a sponsor of a MEP is because of the reasons stated above: its sponsorship of a MEP has employment related impact on its own organization; the operation of the plan is a substantial employment function; and it must comply with the

prohibited transaction rules when setting out it's compensation and that of their affiliates business practices.

2. Self employed

The proposed regulation took the position that self-employed dual status would not be permitted for a PEO participation in a PEO MEP because the self-employed would not be utilizing the services of a PEO. However, the self-employed are the class of employers which would likely best be served by the ability to patriciate in a MEP. Dual status participation should be permitted in a commercial MEP as outlined above in the same manner and under the same conditions as their participation in an association MEP.

Summary

We welcome the Departments recognition of the need to be more flexible in its approach to MEPs for unrelated employers, as a tool to expand retirement plan coverage in the small plan market. We also agree that ERISA does demand an important employment-based structure, one which is not based on non-employment related commercial products. However, a commercial entity which sponsors a MEP also takes on substantial employment related obligations-both of their own and that of their customers-which it never otherwise takes on in its commercial lines of business. An entity which makes the sort of infrastructure investments necessary to make MEP sponsorship work should be welcomed by the Department as furthering the efforts to increase retirement coverage. Any concerns regarding self-dealing and self-promotion by these entities are well handled by the current scheme of prohibited transaction and fiduciary rules.

Thank you.

/s

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