ERISA Advisory Council
U.S. Department of Labor

Hearing on Outsourcing Employee Benefit Plan Services

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Statement for the Record

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Executive Summary

The upcoming discussion on fiduciary outsourcing, and how this could affect coverage, is an important one. 'Multiple Employer Plans' (MEPs) and 'Open MEPs®' come up in these conversations, as these structures have proven to be well organized efforts to aggregate the outsourcing of discretionary fiduciary services related to defined contribution retirement plans of unrelated employers. This aggregation has enabled small employers to cost effectively access expert fiduciary knowledge; obtain access to a wide variety of reasonably priced investment options; and to receive a level of administrative services which are not otherwise available to such employers.

The DOL's Advisory Opinion 2012-04 has forced vendors to reconsider the use of MEPs to provide such outsourced aggregated services. TAG Resource's experience in establishing a MEP for unrelated employers, and then having to unwind such a MEP in order to comply with the DOL's Advisory Opinion, provided it with valuable insight on such outsourcing.

This statement makes the point that the aggregation of outsourced services to unrelated employers can be well performed under existing DOL guidance outside of MEPs. We believe that fundamental changes to the MEP rules (as outlined by the Advisory Opinion) are therefore ill advised and likely to be counterproductive, as such changes may cause a myriad of unnecessary regulatory, technical, enforcement and administrative difficulties.

We do suggest that the major regulatory roadblock to the effective aggregation of outsourced services is the current iteration of the Form 5500. Changes to the 5500 as recommended herein will remove the roadblocks to providing cost effective services to the small and mid-sized plan market, while enhancing ERISA's protection of participant rights under such aggregation programs and MEPs.

Statement of Troy Tisue

My name is Troy Tisue and I'm the President of TAG Resources, in Knoxville Tennessee. We were one of the original pioneers in the so-called "Open MEP" movement, first implementing a multiple employer 401(k) plan for unrelated employers in 2004. As you may know, our MEP model resonated with a lot of people— and our model is still discussed today. We created the Open MEP ® to address coverage— namely, by removing the obstacle that prevented small employers from offering plans. From a coverage perspective, the Open MEP® worked— 40% of our plans were start-ups; these companies cited cost and liability (the relief from, respectively) as the reason they chose to adopt our plan. Note that term "Open MEP®" is actually a registered trademark of TAG Resources.

The upcoming discussion on fiduciary outsourcing, and how this could affect coverage, is an important one. No doubt, 'MEPs' and 'Open MEPs®' will come up in the conversations, as these have proven to be viable outsourcing solutions which has also served to increase small plan coverage. TAG's recent work and experience in this area might prove helpful to this discussion.

Market pressures resulted in TAG approaching the DOL in 2012 for an Advisory Opinion on the treatment of the Open MEP® as a single plan under ERISA. The size of the MEP had become substantial, and important distribution partners needed assurances on its treatment under ERISA. The DOL was unable to provide such assurances, and advised instead that there must be a "common nexus or other genuine organizational relationship that is unrelated to the provision of benefits" in order for a MEP to be treated as a single plan. The DOL also noted in the opinion that the participating employers must exercise direct or indirect control over the plan.

The Advisory Opinion, obviously, caused TAG to engage in a review similar to that which this Council is now conducting. We concluded that what the market was demanding was a cost effective way to increase coverage in the small plan market; to provide "scale" in investment pricing and plan administration to plans for which it was otherwise unavailable; and to provide relief to small employers from increasingly complex fiduciary responsibilities.

Existence of MEP Alternatives

What we finally realized was that a MEP is not necessary to achieve these goals, and that a package of plan services can be designed to effectively mimic the services provided to a client under a MEP. A MEP aggregates services and investments to a number of unrelated employers by the common authority granted under a single plan document adopted by each participating employer. The same could be accomplished by aggregating those same services outside of a MEP, but by the common authority granted by coordinated language in separate plan documents (though those documents may be part of a mass submitter, and thus the operative language can be the same) adopted by each employer participating in the non-MEP arrangement.

Relying upon traditional ERISA concepts related to the delegation of authority (see ERISA Section 402, 405 and ERISA Regs 2509.75-4, 2509.75-8), the delegation of authority under a plan can be "packaged" in a number of different ways which are best suited to both the vendor sponsoring the program and the clients it serves. The arrangements also can be designed so that the small employer delegate certain settlor functions to the service provider.

By paying close attention to the details related to the manner in which authority is granted, and to which party bears what authority, the client services and investments can be cost effectively aggregated.

Because of this, TAG changed its role with all former MEP clients to that of a Plan Administrator to whom was also delegated certain non-Plan Administrator fiduciary authority (under 3(21) of ERISA) necessary to provide the services previously provided under the MEP. This changed the MEP to what we call the 'MEAP' (Multiple Employer Aggregation Program). The MEAP structure allowed us to effectively run the clients' plans, but with a few key changes worth noting: less risk, adherence to current (clear) laws, and greater accountability. In short, what emerged was an aggregated (or shared services) model that retained the efficiency of the Open MEP®, but offered the accountability of single employer plans. We have attached a whitepaper which describes this approach in the context of a PEO.

The efficiency of MEPs is what drew us to them in the first place— it is hard not to see what they could offer in terms of 'coverage'. But the Aggregated Model I just described offers the same advantages under current regulations, while making sure participants in these plans are fully afforded protections under ERISA.

MEPs, in our experience, are not transparent, and can provide a vehicle for bad acting employers to hide. There is no reporting to the IRS or DOL of employer sponsors in a MEP; there is no reporting of the bad acting employer which does not make timely deposits-or even fail to make deposits at all; and there is no ability for the investigators within the various DOL regions to conduct periodic reviews of the individual employers' oversight of the MEP. With all of the emphasis the regulatory agencies are putting on accountability, the lack of transparency in MEPs is clearly a negative.

The real issue

Experience has taught us that the issue that this Council needs to address is not whether there needs to be a change in the MEP rules. Though we are amenable to changes in the those rules, we do not believe that a fundamental change to the DOL's approach to MEPs is necessary to accomplish the goal of increasing coverage for small plans. Significant changes to the rues defining MEPs will, instead, cause a myriad of unnecessary regulatory, technical, enforcement and administrative difficulties. We have found that merely focusing on the MEP definition to be an inappropriate nod to thoughtless inertia.

The solution is much simpler than that. We believe that the only regulatory changes which need to be made to effectively support outsourcing are to the Form 5500 (and, under IRS purview, the Form 5330). The current iteration of the 5500 serves as the only substantial DOL roadblock to cost effectively aggregating services for small employers, while maintaining ERISA protections.

The marketplace already provides for common documents through the IRS's mass submitter programs; investment vendors already provide a variety of methods by which to aggregate investments of unrelated employers; and service provider technology already permits administrators and professional fiduciaries to aggregate their services to plans of unrelated employers. What the market does not have the ability to do is to change the current Form 5500 requirements.

We therefore recommend that the Form 5500 be changed to permit unrelated employers whose plans are under common administration with a common Plan Administrator to elect to file an aggregated Form 5500 with others within the same arrangement. This would include both the MEPs which meet the DOL's existing rules, as well those arrangements with common administration outside of a MEP. The Plan Administrator would be required to file for each employer, regardless of size, information similar to that found in the Form 5500SF. The arrangement, as a whole, would be required to file a consolidated audit and financial statement as currently provided under Schedule H.

We recognize that such changes to the Form 5500 would require substantial effort at a time of limited resources. However, it is a much less burdensome task than attempting to incorporate all of the changes which would occur with a fundamental change in the MEP rules. These recommended Form 5500 changes would further encourage adoption by small employers, while enhancing the DOL's ability to protect participant rights under ERISA.

Transition relief needed

We recognize that a number of existing MEPs do not meet the existing guidance set forth under the Advisory Opinion, but that the unwinding of a MEP is a difficult task. We therefore recommend that the DOL adopt a transition program for those existing MEPs which choose to unwind, including transitional enforcement relief.

Agenda Points

The following provides our responses to the Council's specific agenda points, in addition to being generally addressed in the written statement:

A. Identifying current industry practices and trends regarding the types of services being outsourced (both fiduciary and non-fiduciary) and the market for delivery of those services, including differences in outsourcing practices by type of provider, plan size or plan type.

There is currently a great deal of confusion in the marketplace regarding the packaging of outsourced of fiduciary and non-fiduciary services, there currently being no standardized practices. The differences do not necessarily depend on type of provider. It depends more on the provider's target market, and the vendors own comfort with taking on the risks related to any particular service provided.

The successful vendors specifically identify which statutorily defined (by ERISA and the Code) "Plan Administrator" services they choose to provide; which non-Administrator discretionary fiduciary services they will provide; which non-fiduciary ministerial services will be provided; and which settlor function will be assigned to them. Their contract will typically allow each class of services to be separately terminated.

B. Clarifying the legal framework under ERISA for retaining outsourced service providers, including both plan sponsor and service provider responsibilities, and suggest areas where further DOL guidance might be helpful

The existing DOL's guidance on allocating responsibilities is sufficient to support current activities in the marketplace. However, it would be useful to update 2509.75-4 and 2509.75-8 to "modernize" and broaden their language and examples to make them more easily applicable to current conditions.

C. Making recommendations to DOL about current best practices in selecting and monitoring outsourced service providers, including identification of performance standards, benchmarking of costs and mitigating conflicts of interest;

We believe that the diversity in the marketplace will make it extraordinarily difficult for the DOL to develop meaningful standards related to "best practices." In that ERISA requires *prudence*, not benchmarking, we believe it is well beyond the scope of the DOL's mandate to attempt to develop such standards.

D. For fiduciary services, exploring the differences between status as a fiduciary under ERISA section 3(16), 3(21) and ERISA section 3(38) and the scope of co-fiduciary liability in the outsourcing context

We believe that ERISA, and the regulations promulgated thereunder, are clear in their delineation of the differences between fiduciary authority under 3(16), 3(21) and 3(38). However, it would be helpful for the DOL tom "package" a description of the manner in which these terms differ in formal guidance, such as in a Field Assistance Bulletin.

E. Identifying current contracting practices with respect to outsourced services, including provisions such as termination rights, indemnification, liability caps, service level agreements, etc. that might assist plan sponsors and other fiduciaries in negotiating service agreements

The combining of fiduciary, ministerial and settlor services requires a comprehensive document outlining the rights and responsibilities of all of the involved parties. However, there are few such comprehensive agreements currently in existence in the marketplace from which to draw any sense of current practices.

It is critical, however, that the employer engaging in such practices fully understand that they will retain a "residual" of ongoing fiduciary responsibilities, including the monitoring of the outsourced service providers. They do not get a "free pass" on fiduciary responsibilities, though these services are often marketed in a manner which may lead them to believe this.

The successful vendor provides the participating employer with enough support and information to fulfill its obligation to review.

F. Examining insurance coverage and ERISA bonding practices of outsourced service providers to assist in understanding the extent to which risks are shifted from plan sponsors and other fiduciaries to service providers

A number of insurers are beginning to write both fiduciary insurance and ERISA bonds on an aggregate basis, including covering the fiduciary's and plans' exposures when providing professional fiduciary services to unrelated plans.