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December 20, 2018

Office of Regulations and Interpretations
Employee Benefits Security Administration, Room N-5655
Attn: Definition of Employer – MEPs RIN 1210-AB88
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, DC 20210

Re: RIN 1210-AB88 - Comments on Proposed Regulation Relating to the Definition of Employer under Section 3(5) of ERISA

Ladies and Gentleman:

The ABA Retirement Funds (“ABA RF”) respectfully submits these comments in response to the request by the Department of Labor (the “Department”) for comments on its proposed regulation regarding the circumstances under which a person may act “indirectly in the interest of an employer, in relation to an employee benefit plan” within the meaning of Section 3(5) the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) for the purpose of sponsoring a multiple employer workplace retirement plan (the “Proposed Regulation”). ABA RF commends the Department’s intent to expand access to workplace retirement plans.

As explained below, ABA RF has provided a retirement program to adopting employers for over fifty years and would welcome the opportunity to operate a multiple employer plan (“MEP”). The Department has requested comments on “whether the Department should address, by regulation or otherwise, whether there are other types of entities that should be treated as an ‘employer’ within the meaning of ERISA section 3(5), for the purpose of sponsoring a MEP”. In response, ABA RF recommends that, in the final regulation, the Department make the following changes:

1. Expand the definition of bona fide employer groups or associations set forth in paragraph (b)(1) to include affiliates of associations which are established for the purpose of providing employee benefit plans to the associations’ members as entities that may act “indirectly in the interest of an employer, in relation to an employee benefit plan” within the meaning of Section 3(5) of ERISA.
2. Clarify that the references to employer members of associations, as used throughout the Proposed Regulation, include employers that are not directly members of the association but have at least one employee, partner, shareholder, member, owner, or member of an employer’s governing board as a member of the association.
3. Expand permitted participation in the association-sponsored MEP to employers who are members of other associations that have a relationship with the association sponsoring the MEP.
4. Set forth a procedure pursuant to which an association that does not meet all of the conditions to be an “employer” under the regulation can apply to the Department to become a MEP sponsor.

Expanding retirement plan access to small businesses would be particularly helpful in industries such as the legal profession, where a substantial percentage of lawyers work for very small employers. According to a July 2018 IBIS World Report, “[s]mall law firms, those with fewer than 20 employees, comprise an estimated 94.9% of employing industry establishments.”¹ Permitting bona fide employer groups or associations to organize affiliates to provide retirement plans provides flexibility to those groups and associations in offering a valuable benefit to their members and should be encouraged.

BACKGROUND

I. ABA RF’s Relationship to the American Bar Association

The American Bar Association (the “ABA”) formed ABA RF, an Illinois not-for-profit corporation, for the purpose of providing a retirement solution for adoption by individual lawyers and law firms with employees or partners or other affiliated persons who are members of the ABA or members of state or local bar associations represented in the ABA’s House of Delegates and related organizations. This retirement solution is provided through the ABA Retirement Funds Program (the “Program”), described below. ABA RF operates as an affiliate of the ABA with the sole focus of providing the Program.

ABA RF is governed by the ABA RF Board of Directors (“Board”) that currently consists of thirteen lawyers elected by the ABA’s Board of Governors. The members of the Board are volunteers who receive no compensation for their services. The ABA’s Board of Governors elects Directors who have different areas of expertise so that ABA RF can be

¹ IBIS World Industry Report 54111: Law Firms in the US. July 2018.

operated effectively. For example, several Directors practice, or previously practiced, in the area of ERISA, some are experts in securities laws, and others are experts in contracts.

II. The ABA Retirement Funds Program

ABA RF provides the Program, which is a comprehensive program that provides adopting eligible employers, acting as plan sponsors (“Employers”), administrative, investment and fiduciary services, including the provision and maintenance of tax-qualified retirement plan documents, a fixed menu of diversified investment options, a brokerage window and related recordkeeping and administrative services. Different types of plans are available under the Program (“Plans”). Most Plans are self-directed 401(k) plans or profit sharing plans but certain Employers maintain defined benefit plans or other types of plans with respect to which the Employer directs investment of the Plan assets. ABA RF expects many small Employers, if given the opportunity, would choose to participate in a MEP in order to take advantage of the streamlined administrative simplicity of the MEP, however, other Employers would likely choose to continue to maintain their own single employer plans.

Employers that are eligible to adopt the Program are defined in the applicable Program documents as any (a) sole practitioner, partnership, corporation, limited liability company or association engaged in the practice of law that employs or includes at least one individual who is a member or associate of the ABA or any organization of lawyers represented in the House of Delegates of the ABA, (b) organization of lawyers represented in the House of Delegates of the ABA or (c) organization that does not engage in the practice of law but is closely associated with the legal profession, that receives the approval of ABA RF, and that has as an owner or a member of its governing board a member or associate of the ABA or any organization of lawyers represented in the House of Delegates of the ABA or the ABA. Because an Employer may be a

sole practitioner with no employees, certain of the plans participating in the Program are not subject to ERISA. In addition, most of the plans have less than 100 participants and many have less than 10 participants.

ABA RF is both a fiduciary and a service provider to each Plan after a sponsoring Employer adopts the Program. Pursuant to the terms of the Program documents, ABA RF has the authority to engage, monitor and terminate the various other service providers to the Program. Those service providers are a trustee, that acts as a discretionary trustee of the Plan's assets held in the Program's collective trust (the "Program's Collective Trust") and the directed trustee of the Plan assets invested through the brokerage window; a recordkeeper, that provides ministerial administrative/recordkeeping services to the Plans; and a brokerage window provider, that provides the Program's brokerage window. Each of the service providers, including ABA RF, receives compensation from the Program's Collective Trust that is fully disclosed to eligible employers prior to the time they adopt the Program.

Prior to the adoption of the Program, an Employer receives materials containing detailed information regarding the services provided by ABA RF and other Program service providers to a Plan. If, at any time, an Employer desires to stop participating in the Program for any reason, it may terminate its participation in and withdraw its Plan from the Program without advance notice to, or penalty imposed by the Program.

RECOMMENDATION REGARDING THE PROPOSED REGULATION

1. Expand the Definition of Bona Fide Employer Groups or Associations to Include Affiliates of Associations

We respectfully recommend that the Department expand the definition of bona fide employer groups or associations set forth in paragraph (b)(1) of the Proposed Regulation to include affiliates of associations which are established for the purpose of providing employee benefit plans to the associations' members as entities that may act "indirectly in the interest of an employer, in relation to an employee benefit plan" within the meaning of Section 3(5) of ERISA.

ABA RF, which has been providing a retirement solution for over fifty years, believes that its ability to sponsor a MEP would make the Program available to more small and mid-sized businesses, a point of emphasis of Executive Order 13847.² Although the Program, as currently constituted, significantly reduces the administrative burden on Employers, certain administrative responsibilities must still be fulfilled by the Employers. These responsibilities include, for example, the filing of a Form 5500 by those Employers required to file a Form 5500. A MEP would permit ABA RF to assume the responsibility for filing a single Form 5500 that would apply to all of the Employers participating in the MEP, thereby simplifying administration for those Employers.

Under the Proposed Regulation, it appears that ABA RF may not constitute a "bona fide employer group or association" because it does not directly "have at least one substantial business purpose unrelated to offering and providing MEP coverage or other employee benefits to its employer members and their employees." However, the ABA, which controls the ABA RF, does have a substantial business purpose unrelated to offering and providing MEP coverage or other employee benefits and otherwise appears to meet the conditions to be eligible to sponsor a MEP under the Proposed Regulation. Accordingly, it appears that the ABA should be able to

² As noted in the notice of proposed rulemaking, Executive Order 13847 directs the Secretary of Labor to examine policies that would "clarify and expand the circumstances under which United States employers, especially small and mid-sized businesses, may sponsor or participate in a MEP as a workplace retirement savings option offered to their employees, subject to appropriate safeguards..."

directly act as employer of a MEP under the definition set forth in the Proposed Regulation. The fact that the ABA determined that a retirement solution should be provided to its members through an affiliate, rather than directly, should not make ABA RF, an affiliate of the ABA, ineligible to act as an employer under Section 3(5) of ERISA.

There are business reasons for an association to establish an affiliate to provide employee benefit plans to its members. For example, ABA RF, as a separate entity, can provide dedicated attention and expertise in administering and maintaining the Program, while allowing the ABA to focus on its business purpose. ABA RF understands that the Proposed Regulation attempts, in part, to “distinguish bona fide group or association MEPs from products and services offered by purely commercial pension administrators, managers, and recordkeepers.” ABA RF believes that adopting the recommendation described in this paragraph would be consistent with the purpose of the rule and would not lead to the establishment of a “purely commercial” MEP industry. Moreover, to address that concern, the Department could limit affiliate organizations permitted to sponsor MEPs to not for profit entities controlled by a bona fide association that meets the definition of “bona fide group or association of employers” under the regulation.

2. Clarify the References to Employer Members of Associations

We respectfully recommend that the Department clarify that the references to “employer members” of associations, as used throughout the Proposed Regulation, include employers that are not directly members of the association but have at least one individual who is employee, partner, shareholder, member or owner of the employer, or member of an employer’s governing board as a member of the association. In the case of the ABA, individual attorneys become members of the ABA. A law firm or other entity with attorney employees or partners generally does not become an employer member of the association. Therefore, without this change, an

association that offers individuals membership in the association rather than offering membership to employers could not act as an employer with respect to a MEP. ABA RF believes that adopting the recommendation described in this paragraph would expand the number of associations that could be eligible to sponsor a MEP and would be consistent with the purpose of Executive Order 13847.

3. Expand Participation to Employers with Employees who are Members of Associations that have a Relationship with the Association Sponsoring the MEP.

We respectfully recommend that the Department expand the types of employers that are permitted to adopt a MEP sponsored by an association (or an affiliate of an association) to include employers with individuals who are members of other associations that have a relationship with the association sponsoring the MEP. In the case of the ABA RF, the Program may be adopted by employers with employees, partners, etc. that are members of the ABA, as well as employers with employees, partners, etc. that are members of state and local bar associations represented in the ABA's House of Delegates. In this case, the state and local bar associations have a bona fide relationship with the ABA because those associations must be represented in the ABA RF's House of Delegates and are intended to provide resources to lawyers, which is a similar purpose of the ABA. All of the Employers satisfy the commonality of interest standard of the Proposed Regulations because the Employers are in the same line of business or the same industry.

If the Department adopts this recommendation, an association-sponsored MEP would have the ability to increase the number of employers adopting the MEP, thereby increasing the assets of the MEP. A larger MEP will have the benefit of economies of scale with the ability to attract service providers with more favorable fees and other terms. This will benefit all adopting

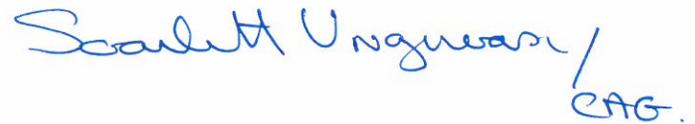
employers. The Department should adopt rules and policies designed to enable the association MEPs to attract many employers and grow the assets of the MEPs. This recommendation is intended to facilitate that goal.

4. Additional Recommendation. If the Department does not adopt the recommendations described in this letter, ABA RF requests that the Department set forth a procedure in the regulation pursuant to which an association that does not otherwise meet all of the conditions to be an “employer” under the regulation can apply to the Department to become a MEP sponsor.

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On behalf of the ABA Retirement Funds, we thank you for considering our comment. If you have any questions or need additional information, please let us know.

Sincerely,



Scarlett Ungurean, CFA, CPA CA
Executive Director