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December 20, 2018

The Honorable Alexander Acosta
U.S. Department of Labor
200 Constitution Avenue, NW
Washington DC 20210

Re: Definition of Employer – Association Retirement Plans and other Multiple Employer Plans (RIN 1210-AB88)

Dear Secretary Acosta:

AARP commends the Department for starting to issue guidance to permit the development and operation of qualified “group” or “association” retirement plans, which hold promise as a way to expand retirement plan sponsorship and coverage for small employers and their employees and family members. AARP, with its nearly 38 million members in all 50 States, the District of Columbia, and the U.S. territories, is a nonpartisan, nonprofit, nationwide organization that helps empower people to choose how they live as they age, strengthens communities, and fights for the issues that matter most to families, such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse.

Policymakers have struggled for decades to find workable solutions for the millions of workers and their family members who want simple and effective ways to supplement their Social Security benefits by saving for retirement. Social Security is a successful system, in significant part, because nearly all workers are automatically enrolled and employee and employer payroll contributions are automatically withheld from paychecks. Social Security provides a base of retirement income and ideally will be supplemented by employer-paid or facilitated plans and individual savings. While large employers usually sponsor retirement plans, small employers and employers with more transient workforces have struggled to offer retirement coverage.

Numerous surveys of consumers have found that individuals prefer automatic enrollment in employer offered retirement savings plans.¹ Further, employees are 20

¹ <https://www.pewtrusts.org/en/about/news-room/opinion/2018/09/04/automatic-enrollment-for-retirement-savings-an-increasingly-available-option-with-a-large-impact>.

times more likely to save if they are offered an automatic payroll deduction option at work. The benefit of automatic enrollment is that it minimizes participant inaction and facilitates payroll deduction every pay period. Larger employers have found that sponsoring plans with automatic enrollment and payroll deduction is both popular with their employees and enables workers to accumulate significant savings to supplement Social Security at retirement.²

It has been a harder challenge to encourage most small employers to offer payroll deduction savings plans. Small employers are focused on running their businesses and do not usually have the time or expertise to sponsor a retirement plan. As the Department notes, cost and liability are related issues. Thus, the challenge is how to authorize retirement savings vehicles that will be relatively easy for small employers to offer, yet appropriate and adequate for their workers. It has long been hoped that permitting group or pooled arrangements would provide an easier option for smaller employers and good benefits for workers. The Department has decades of experience with pooled type plans for both retirement and health benefits. As AARP understands the history in this area, two of the largest problems have been: 1) unpaid employee and employer payroll contributions by employers, and 2) fraud and abuse of assets by pooled plan providers. Any final Department rule must provide standards to prevent these known types of abuses. The best way for pooled plans to offer successful retirement savings options to workers with minimal fraud and abuse is for DOL to establish clear and transparent rules and reporting for employers and the plans.

The Department's proposed rule takes the first step and clarifies the type of entity that may provide a group or association plan (a.k.a. multiple employer plan or MEP). AARP strongly supports the Department's requirement that the MEP act in a fiduciary capacity and financial service firms be prohibited from sponsoring a MEP. MEPs cannot be successful if the plan provider is self-interested. While the financial services industry is expert at selling financial services, they almost always face conflicts of interest in prudently determining which retirement investments and charges are appropriate. Most financial service firms do not act in a fiduciary capacity for key retirement plan functions.³

The Department should establish minimum standards for the type of firms that may sponsor a MEP, including, but not limited to:

- Minimum years of experience providing retirement benefits;
- Minimum key staff qualifications;
- Minimum capital reserves; and
- Minimum bonding and fiduciary liability insurance.

The Department is seeking comments on whether it should apply comparable standards between related and non-related or non-employer entities that seek to serve as a MEP

² https://pressroom.vanguard.com/nonindexed/HAS18_062018.pdf.

³ SEC Statista.com, 2018; FINRA Statistics, 2018; GAO, Pension Plans: Fulfilling Fiduciary Obligations Can Present Challenges for 401(k) Plan Sponsors, July, 2008.

that is “acting indirectly in the interest of an employer”. AARP has supported the Federal legislation that would permit open-MEPs.⁴ AARP has supported the broader conception for four reasons: 1) the legislation makes clear that the MEP must act as a fiduciary, including over investment selection; 2) the legislation makes clear that employers and employees cannot be charged unreasonable fees; 3) MEPs would be required to register with DOL and DOL is authorized to issue a model plan and any needed standards, and 4) modern technology and plan evolution has made these types of plans simpler and more transparent.

On the last point, 401(k) type plans need not be complex. Plans primarily need an integrated payroll deduction and recordkeeping system; an experienced fiduciary who can evaluate, negotiate and monitor an appropriate number and type of retirement investments for the participants and beneficiaries covered; one or more payment systems to pay out savings at retirement age; and a process for compliance with the law. There are many experienced individuals and firms that carry out these services. This is a well-developed market with a handful of firms that provide most of those services to employers. Provided the Department also establishes adequate disclosure documents, as long as employers, participants, and the Department can timely monitor MEP operations and redress any problems, AARP believes it is worth permitting firms to provide these needed retirement services for small employers and their employees.

Employer and MEP Responsibilities

Any final rules should provide clear rules for employer and group/pooled plan responsibilities. As the Department notes, ERISA clearly states that the fundamental responsibility of all employers is to prudently select and monitor their employee benefit plan. In order to assist small employers, the Department should provide a few clear parameters, a safe harbor or checklist of what may constitute prudent selection and monitoring.

AARP recommends that the Department encourage or require employers to:

- consider at least 3 plans;
- examine how long the plan has been in existence;
- review how many other employers and employees are actively enrolled;
- consider the investment options and all employer and participant fees; and
- any other standards the Department determines necessary.

The Department also should make clear that the employer must receive and review a report on plan operations and periodically assess employee satisfaction and complaints at least annually.

Further, to ensure the system is viable for employers, employees and plans, the Department needs to provide reasonable operating standards for the plans. The plans

⁴ See, the Retirement Enhancement and Savings Act, S. 2526, HR 5282.

should have a board with employer representatives as the Department has proposed, the plans also should have written rules on employee coverage, automatic enrollment, employee contribution levels, employer contributions, investment options, default contributions and investments, fees, loans and pre-retirement withdrawals, if any, and retirement age payment options.

The MEP should have fair rules that apply to all employers and participants and beneficiaries. Permitting MEPs to maintain multiple different rules for employers will increase complexity and costs for all. A pooled plan may offer one or a few options to employers, but the Department should discourage multiple and confusing plan options. Requiring pooled providers and employers to make multiple decisions both reduces employer interest and increases employer and pooled provider fiduciary responsibility. Most importantly, the Department should make clear to all parties that if the employer selects any investment options, the employer must act and be liable in a fiduciary capacity.

Ideally, the pooled plan will undertake these fundamental responsibilities that are required under ERISA. Again, the employer should prudently select and monitor the pooled plan and the pooled plan should be required to act as a fiduciary carrying out all remaining plan duties, and without any conflicts of interest. As the Department notes, Chambers of Commerce and payroll service firms may easily be able to offer pooled plans to their members and many already do so. However, one problem has been that financial service firms have offered financial incentives to select their firm's products. As a fiduciary, pooled plans may no longer accept such financial incentives.

Employer and Participant Disclosure

One of the most important and effective ways to make MEPs work successfully is to have clear public disclosure requirements. Pooled plans should be required in the final rule to provide a clear statement to employers and employees on employer duties and plan operations. Both employers and employees need to understand how the plan works and its key requirements. This information must be delivered to both parties reasonably in advance of joining the plan. In addition, participants and beneficiaries must be provided an annual statement of their earned benefits, investments, and fees charged. All documents, including the annual benefit statement, should be delivered via paper unless the person specifically requests electronic delivery. AARP and others have conducted several consumer surveys that have documented strong employee support for paper disclosures.⁵

⁵ Epsilon (June 2012). Channel Preferences Survey.

<https://web.archive.org/web/20130321145541/http://www.epsilon.com:80/news-and-events/press-releases/2012/consumer-survey-reveals-notable-difference-channel-preferences-m>;

InfoTrends in collaboration with the USPS Office of Inspector General. Report No. RARC-WP-13-009. (2013, May 21). What America Wants from the Postal Service: A Survey of Internet-Connected

Americans. https://www.uspsoig.gov/sites/default/files/document-library-files/2015/rarc-wp-13-009_0.pdf;

Perron, Rebecca, Ph.D., AARP (November 2012). Paper by Choice: People of All Ages Prefer to Receive Retirement Plan Information on Paper.

There also is growing research documenting that individuals do not carefully read and understand electronic materials and that electronic information is easily missed and negatively affects decision-making.⁶

The pooled plans also should be required to file an annual report on plan operations – a new form 5500 attachment or a new form – that details the number of enrolled employers, covered participants and beneficiaries, financial institutions and registered investment options, individual and total fees, and lists the names of each enrolled employer. The Department should configure its website so that employees can search and find their plan by employer or plan name. Either the pooled plan or the employer must be required to provide the annual reporting form and all other required disclosures to participants and beneficiaries. All pooled plans should be required to notify the Department of their operation. To encourage an easy and transparent system for small employers to offer group retirement plans, the Department should establish a public list of all pooled plans in a designated and clear location on its website that employers and employees can readily check.

The Department asked for comments on needed participant information. Participants and beneficiaries need to receive regular written information on:

- who is operating the plan,
- what are the key plan rules and requirements,
- what actions must the eligible participant or beneficiary undertake,
- what percent of salary will be deducted each pay period,
- when are employees eligible to join the plan,
- are there employer contributions and how much,
- what are the investment choices,
- what are each and the total amount of the fees being charged against their accounts,
- to whom do they ask questions or make complaints, and
- how and when may they receive their earned funds.

MEP Administration:

The Department also asked for advice on investment management, recordkeeping, and plan costs and expenses. The good news is that there are many firms that provide affordable recordkeeping and investment services and the market has been improving. Plan costs have dropped significantly, in large part due to the introduction of technology and public disclosure of all costs. Increasingly, the largest cost is administration and recordkeeping – largely the fixed costs of collecting employee data, transferring funds,

https://www.aarp.org/content/dam/aarp/research/surveys_statistics/consume/2012/Paper-by-Choice-People-of-all-ages-prefer-to-receive-retirement-plan-information-on-paper-AARP.pdf.

⁶ See for example, TIAA Institute, “Millennial Financial Literacy and Fin-Tech Use: Who Knows What in the Digital Era”, September 2018.

and monitoring and tracking all accounts. The median administrative and recordkeeping charge is 59 basis points.⁷

Investment management charges have declined, and in some cases significantly. There are many low cost retirement appropriate investments in the market. Cost effective high performing investments are available to individuals as well as groups. Individuals do not need large balances in order to purchase these well performing long-term investments; they do, however, need to have some investment knowledge. There are many retirement appropriate investments that charge 0-15 basis points (tenths of a percent of total investment). There also are mediocre investments that charge 100-400+ basis points. For this reason, it is critical that the MEP be required to act as a fiduciary in selecting investments, including the plan default investment for participants and beneficiaries who do not make an affirmative investment selection.

The financial services industry also sells many different types of products. It also will be a critical part of the MEP's fiduciary duties to prudently select only those products and services that are appropriate for covered participants and beneficiaries. Relatedly, every MEP will need to select a default investment for participants and beneficiaries who do not make any investment selection. The MEP should rely on the Department's qualified default investment alternative rules and prudently select an appropriate balanced or target date fund. Again, there are many excellent retirement appropriate investment products readily available, and that can be provided to MEP participants for less than 35 basis points. There are numerous studies documenting that most balanced funds and many target date funds perform well in the market over long periods of time. This information can be accessed easily by providers and employers, as there are many companies that provide regular administrative and investment firm and product ratings.

Further, any final rule should address the problems that have previously occurred in these types of plans. The Department should provide a clear rule that if an employer fails to pay employee or employer required contributions, the pooled plan will freeze the account, and notify the employer, employee and the Department. There is no reason to permit missed payments to accumulate and clear rules should timely prevent fraud and abuse and dashed expectations. Payroll deduction technology is very advanced and can quickly detect any missing elements.

Similarly, all pooled plan contributions should be invested in Federally or State licensed bank, insurance or mutual fund investments and if any contribution is more than 14 days late, the applicable financial institution should be required to report the missing payment to the plan, employer, participant and Department. All pooled plans should be required to post the financial institutions with whom they invest in their annual report as part of their registration filing, and on their websites and other relevant disclosures. The Department should set bonding and fiduciary liability requirements for pooled plans.

⁷ NEPC, Defined Contribution Plan and Fee Survey, 2017.

State Facilitated Open MEPs

State programs are a critical component to addressing the long-entrenched problem of 55 million Americans lacking a way to save for retirement using payroll deductions from their regular paycheck. To date, roughly 8 states have enacted laws that will extend access to more than 16.7 million workers. One of these states – Vermont – has chosen to establish a state facilitated open MEP and has already awarded the request for proposal to a private sector company that will operate the program. Additional states plan to introduce this model next year. The Department should make clear in its rule that states can continue to move forward with enacting and implementing state facilitated open MEPs.

Conclusion

AARP commends the Department for efforts to encourage a viable retirement savings option for small employers and their employees. The key to success is to provide clear and achievable rules for employers, and clear and protective rules for plan participants. Millions of employers and workers are benefiting from existing successful retirement savings plans. It is time we extend these successful practices – automatic enrollment, payroll deduction, prudent investments – to the uncovered workforce. AARP is happy to provide any needed additional assistance or information.

Sincerely,

A handwritten signature in black ink, appearing to read "David Certner", with a long horizontal flourish extending to the right.

David Certner
Legislative Counsel and Legislative Policy Director
Government Affairs