National Association of Home Builders

Office of Legal Affairs
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December 21, 2018

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

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

To Whom It May Concern:

On behalf of the National Association of Home Builders of the United States ("NAHB") and its membership, I am pleased to submit comments in response to the proposed rules issued by the Department of Labor (the "Department") that would broaden the criteria under Section 3(5) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") for determining when employers and individuals may join together to form a group or association treated as the sponsor of a single retirement plan (the "Proposed Rules").

Overview of NAHB

Since it was founded in the early 1940s, NAHB has worked to ensure that housing is a national priority and that all Americans have access to safe, decent and affordable housing. NAHB represents the largest network of craftsmen, innovators and problem solvers dedicated to building homes and enriching communities. Each year, NAHB's members construct about 80% of the new homes built in the United States, both single-family and multi-family. Comprised of a federation of more than 700 state and local builders' associations, NAHB represents more than 140,000 members. About one-third of NAHB's members are home builders and remodelers and the remaining members work in closely related specialties, such as, sales and marketing, housing finance, building trades and manufacturing and supply of building materials. We are dedicated to providing education and tools to our members, servicing their business needs and assisting them in navigating today's complex political and economic issues.

NAHB commends the Department on making retirement security an important national priority. This need is particularly acute in the residential construction sector of the home building industry, where most members are small business owners with less than 10 employees. The Proposed Rules are an important step forward for American workers by removing needless regulatory barriers that will help more trade groups and small businesses provide workplace retirement plans for their employees.

We believe that associations, such as NAHB, are uniquely suited to provide workplace retirement plans to their members, many of whom do not have access to retirement benefits through an employer, by leveraging economies of scale and administrative efficiency. We recognize that the Proposed Rules chart new territory for retirement plans sponsored by associations and appreciate the opportunity to submit the following comments on the Proposed Rules.

Definition of Bona Fide Association (§2510.3-55(b)(1))

The Proposed Rules enable associations to provide retirement plan coverage to their members and to provide a regulatory framework for treating retirement plans sponsored by associations ("Association Retirement Plans" or "ARPs") as single benefit plans for purposes of federal law. NAHB supports the expansion of the definition of "employer" for purposes of Section 3(5) of ERISA and the proposed requirement that an association have at least one "substantial business purpose" unrelated to offering and providing employee benefits to qualify as a "bona fide association." We believe that a bona fide association will be better equipped to serve as the plan sponsor and administrator of an ARP and assume the necessary reporting, disclosure and fiduciary duties that accompany such role. We recommend that only a legitimate established organization or other entity affiliated with such an organization, be permitted to sponsor an ARP. To that end, we recommend that the criteria to be a "bona fide association" be revised to require that the association be (i) organized under the laws of a state, (ii) recognized as a not-for-profit corporation with exemption from federal taxation; and (iii) established and operated for at least two years prior to the date the ARP is established.

In addition, we recommend that the final rule be clarified to permit an association (as defined above), or multiple affiliated associations in the same industry, to join together to establish a trust or other legal entity for purposes of sponsoring an ARP. This clarification will ensure that ARPs are sponsored and administered by bona fide associations, or joint entities or trusts established by or affiliated with bona fide associations, and will protect consumers from commercial arrangements that are established solely for financial gain without any real nexus to the members.

Further, the Proposed Rules make an assumption that the members of an association are either employers of common law employees or working owners with dual employer/employee status. We would like to highlight the fact that not all association membership consists solely of employer groups and working owners. In fact, membership in an association is often comprised of individuals who may be common law employees of employers that are not also members of the association. For example, membership in the NAHB consists of individuals who are members of their local affiliated building association, sole proprietors working in the industry who meet membership criteria and students or apprentices sponsored by a member. Other associations where this membership structure is prevalent include professional associations, such as the American Bar Association. We encourage the Department to clarify that members of an association may participate in an ARP sponsored by that association even if their common law employer is not also a member of the association.

Commonality of Interest Test (§2510.3-55(b)(2))

NAHB supports the first prong for satisfying the "commonality of interest" test set forth in §2510.3-55(b)(2)(i) of the Proposed Rules, namely that the employers participating in the ARP be in the same trade, industry, line of business or profession, regardless of geographic location. However, we have concerns about the second prong of the commonality of interest test set forth in §2510.3-55(b)(2)(i)(B) of the Proposed Rules that would permit single large group retirement plans to be established by regional associations without any common ties by trade, industry or profession. We believe the second prong of the commonality of interest test facilitates the establishment of commercial arrangements with no connection or ties to underlying participants (other than geography) and could result in an increase in arrangements that are susceptible to financial mismanagement and insolvency and lack of fiduciary oversight.

With regard to the meaning of the terms "trade," "industry" or "line of business," NAHB supports the Department's intention to interpret these terms broadly to encompass related trades in the same industry. For example, while all NAHB members must serve the home building, multi-family development and remodeling industry, in addition to builders and developers, members also include a wide variety of professionals, artisans and tradespeople, such as plumbers, carpenters and electricians, who support the home building and development industry. In short, all members of a legitimate association should be permitted to participate in an ARP sponsored by the association, provided they otherwise meet the criteria for membership. For this reason, we agree that it is important to maintain the organizational structure, participation, governance and functional control requirements of the Proposed Rules.

Expansion of ARP coverage to Working Owners and Definition of Working Owner (§2510.3-55(d)(1) and (2))

NAHB strongly supports the expansion of access to workplace retirement plans under an ARP to "working owners" and supports the criteria for purposes of meeting the definition of "working owner" in §2510.3-55(d)(2). We believe this workable definition will enable interns and apprentices of trades, such as the building trades, to qualify for retirement coverage under an ARP sponsored by an association of which they are members. Apprenticeship and internship programs are extremely common in many industries, including the building industry, and offer a career path to many individuals who choose not to attend a four-year college or university. We commend the Department for establishing flexible participation criteria based on hours worked performing services for a working owner's trade or business — even if such individuals are not working a full-time schedule or paid for their work — and we believe this will help narrow the retirement coverage gap for these individuals.

In accordance with NAHB's support for a generous and expansive definition of "working owner," we recommend that the Department modify the proposed participation criteria based on wages that would require a working owner's wages or self-employment income from such trade or business to be at least equal to the working owner's cost of coverage to participate in the association's health plan, if the association has such a plan. Although we understand that the Department has adopted this threshold to match the working owner provisions in the final rules for Association Health Plans, we believe that this requirement is not necessary within the context of retirement plans and may restrict access for individuals who work part-time or seasonally. We further believe that the final rule should not limit the definition of working owners to self-employed individuals as described in Section 401(c) of the Internal Revenue Code. We encourage the Department to adopt workable, less burdensome standards for verifying initial eligibility and monitoring continued eligibility for working owners and favor adoption of an attestation process similar to that in the Association Health Plan rule.[1]

Clarify that Participation in ARP is not a Basis for finding Joint Employment Status under other Federal and State laws

We believe it is important for the Department to add a safe harbor to the regulation to clarify that an employer's participation in an ARP with other unrelated employers does not create or imply joint employer liability among the members of the association for purposes of other sections of ERISA, such as Section 510 of ERISA, other federal and state labor laws, or common law. Adding a safe harbor to the final rules is essential to preserve the independent nature of small businesses and working owners and mitigate their exposure to additional liability

[1] 83. Fed. Reg. 28912 (June 21, 2018).

under the joint-employer claim. We strongly encourage the Department to include such a provision to remove a significant barrier to employer participation in multiple employer plans (MEPs) and optimize the potential for MEPs to effectively expand retirement coverage. Finally, we believe that the final rules should also clarify that the sponsor of the ARP cannot be sued as an "employer" under Section 510 of ERISA and should be treated as an "employer" solely for purposes of Section 3(5) of ERISA to enable an ARP to be treated as a single plan.

Additional Notice or Reporting Requirements Are Not Necessary to Ensure Parties Are Adequately Informed of Their Rights and Responsibilities Under MEPs

NAHB believes that the current notice and reporting requirements under existing laws are sufficient to inform participating employers, participants, and beneficiaries of MEPs of their right and responsibilities with respect to MEP coverage. Participants will receive the same fiduciary protections under a MEP as they would under a 401(k) plan, thus reducing the need for any extra notification. Similarly, there is no need to require a separate notice in cases where the MEP sponsor sends plan notices directly without including the employer's name, as information identifying the MEP sponsor and its role can be included with notices given upon the account being opened. Additional notification requirements would serve only to introduce an unnecessary burden and counteract the streamlined and simplistic approach to retirement coverage that MEPs are intended to provide. Further, NAHB appreciates that the preamble to the Proposed Rule provides that the MEP sponsor, not the individual employer, will be responsible for all notice and disclosure requirements. We encourage the Department to include this statement in the final rule itself to provide certainty.

The Rules Regarding Electronic Delivery Should Be Updated

In keeping with simplicity, NAHB believes that the Department should modernize the electronic delivery rules to encourage the use of electronic delivery and to allow plan sponsors the choice of using electronic delivery as the default delivery option for benefit notices. Updating the rules on electronic discovery would modernize notice and disclosure requirements for benefit plans by eliminating wasteful costs and allowing important information to reach participants in a timelier and more effective manner.

Coordination with Federal Tax Laws

NAHB recommends that the Department coordinate with the Department of Treasury and Internal Revenue Service (IRS) in issuing guidance applicable to ARPs, particularly with regard to nondiscrimination testing of the employers and working owners participating in the ARP. In particular, it is important for the IRS to address existing rules that provide if any employer in a multiple employer plan (MEP) fails nondiscrimination testing, it can disqualify the entire MEP. It will be important for the IRS to clarify that this rule does not apply to ARPs and to develop guidance addressing the application of safe harbors and other qualified plan testing rules to ARPs. Additionally, we encourage the Treasury to consider proposing amendments to regulations or other guidance regarding the circumstances under which a MEP must satisfy tax qualification requirements under the Internal Revenue Code, and we ask the Department to share these comments with the Treasury.

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In conclusion, we support the Department's effort to expand the sponsorship of retirement plans to legitimate associations for the benefit of their members. We believe that ARPs, if properly structured, will result in lower

costs (both respect to plan administration and investment fund options) and provide greater access to workplace retirement plans for small employers and individuals through membership in an association.

Respectfully submitted,

James G. Rizzo