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

Subject: RIN 1210-AB88– Definition of “Employer” Under Section 3(5) of ERISA – Association Retirement Plans and Other Multiple Employer Plans

Greetings:

On behalf of the American Council of Life Insurers (ACLI)¹, we appreciate the opportunity to provide comments in response to the Notice of Proposed Rulemaking (Proposal) issued by the Department of Labor (the Department) to clarify which persons may act as an “employer” within the meaning of section 3(5) of the Employee Retirement Income Security Act of 1974 (ERISA) in sponsoring a multiple employer defined contribution pension plan (MEP). As detailed herein, ACLI has serious concerns with this Proposal. We ask the Department to revise the proposal to remove restrictions that are not required by ERISA.

As leading providers in the small plan marketplace², ACLI members agree that a critical challenge in enhancing American’s retirement security is expanding access to employment-based retirement plans. ACLI strongly supports efforts to enhance coverage under the current voluntary employee benefit plan system, including legislative and/or regulatory proposals to expand and enhance employer’s access to and utilization of MEPS. MEPS enable business owners to join

¹ The American Council of Life Insurers (ACLI) advocates on behalf of 290 member companies dedicated to providing products and services that promote consumers’ financial and retirement security. 90 million American families depend on our members for life insurance, annuities, retirement plans, long-term care insurance, disability income insurance, reinsurance, dental and vision and other supplemental benefits. ACLI represents member companies in state, federal and international forums for public policy that supports the industry marketplace and the families that rely on life insurers’ products for peace of mind. ACLI members represent 95 percent of industry assets in the United States. ACLI member companies offer insurance contracts and other investment products and services to qualified retirement plans, including defined benefit pension and 401(k) arrangements, and to individuals through individual retirement arrangements (IRAs) or on a non-qualified basis. ACLI member companies also are employer sponsors of retirement plans for their own employees.

² Three-fifths of small employers (those with 99 or fewer employees) rely on life insurer products and services in their employment-based retirement plan.

together to achieve economies of scale with respect to plan administration and advisory services, making plans for small businesses much more affordable and effectively managed, and thereby encouraging more employers to offer their employees retirement plans. However, as discussed in detail below, this rulemaking proposal as well as the Department's current guidance unnecessarily restrict employers from engaging a person, group or association to act on their behalf in relation to an employee benefit plan with conditions not required by ERISA.

The Department states in the preamble that the proposed regulation "clarifies that employer groups or associations and PEOs can, when satisfying certain conditions, *constitute 'employers'* within the meaning of section 3(5) for ERISA for purposes of establishing or maintaining an individual account employee pension benefit plan"³ (emphasis added). Accordingly, the Department states that, under its proposal "an employer group or association would be acting as *the 'employer'* sponsoring the plan within the meaning of section 3(5) or ERISA."⁴ (emphasis added). For reasons not explained, the Department, without any legal or statutory basis, focuses on when a group or association can act as an employer in the context of establishing or maintaining a plan. Instead, the Department's focus should be on groups or associations acting for an employer *in relation to an employee benefit plan*. ERISA section 3(5) includes within the definition of 'employer' both a person acting directly as an employer and, omitted from this rulemaking proposal, a person acting "indirectly in the interest of an employer, in relation to an employee benefit plan" such as a "group or association of employers acting for an employer in such capacity." By omitting this equally relevant concept, the proposal perpetuates restrictions on employers that are not required by the statute.

We are concerned that the Department's prior interpretations of who may serve "indirectly in the interest of an employer," in relation to an employee benefit plan under ERISA, are having a chilling effect on the establishment and maintenance of MEPs and increasing the cost of operating and maintaining existing plans, all to the detriment of the employees of small businesses. The Department has a unique opportunity to correct this – and, in doing so, to meaningfully impact the ability of Americans to access retirement plans and save for a secure retirement. A failure to take advantage of this opportunity to remove restrictions not required by ERISA would continue to frustrate the intent of ERISA and expound unnecessary, unfounded, and situational interpretations of who and how employers may engage persons to serve indirectly in the interest of an employer in relation to an employee benefit plan under ERISA.

To meet the terms of the President's Executive Order, the Department needs to revoke its prior guidance on open MEPs. It should be sufficient that a person (as defined in ERISA 3(9)) establish that said person is acting indirectly in the interest of an employer in relation to an employee benefit plan, regardless of whether the person is or is not a group or association, with or without some participating employer "nexus" or "commonality of interest."

³ 83 Fed. Reg. 53534 (Oct. 23 2018).

⁴ *Id.*, at 53535.

I. The Proposal Falls Short of the President's Executive Order

On August 31, 2018, President Trump issued an Executive Order on “Strengthening Retirement Security in America.”⁵ Section 1 of the Executive Order states that “expanding access to multiple employer plans (MEPs), under which employees of different private-sector employers may participate in a single retirement plan, is an efficient way to reduce administrative costs of retirement plan establishment and maintenance and would encourage more plan formation and broader availability of workplace retirement plans, especially among small employers.” Accordingly, the Executive Order directs the Secretary of Labor to, within 180 days of the date of the order, consider, consistent with applicable law and the policy set forth in section 1 of the order, whether to issue a notice of proposed rulemaking, other guidance, or both, that would clarify when a group or association of employers or other appropriate business or organization could be an “employer” within the meaning of section 3(5) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1002(5).

The Proposal falls short of the Executive Order in several ways. First, the Executive Order requires the Department act consistent with applicable law. As further detailed below, applicable law does not include a “nexus” or “commonality of interest” requirement with respect to when a group or association of employers can be an “employer” within the meaning of ERISA section 3(5). Second, also as detailed below, the Executive Order directs the Department act consistent with the policy contained in section 1 therein. As noted above, the section 1 policy statement states that this Administration’s policy supports expanding access to MEPs *for employees of different private-sector employers* (emphasis added). The Administration’s policy statement does not include restrictions, such as employees of different private sector employers in the same profession, or in the same geographic region. Further, although the policy directs the Department to “clarify and expand the circumstances under which United States employers, especially small and mid-sized businesses, may sponsor or adopt a MEP as a workplace retirement option for their employees, subject to appropriate safeguards, the Department has not demonstrated that the Proposal’s employer commonality restrictions are safeguards. In fact, the Department has never provided any rational basis for inclusion of a commonality restriction in any of its prior guidance. Third, the Proposal fails to properly address the second part of the definition – when a group or association can act indirectly in the interest of an employer, in relation to an employee benefit plan, in the MEP context.

We urge the Department to reconsider its approach to be more consistent with the President’s Executive Order. As the Department stated in Association Health Plan final rule “in addition to the text and structure of Title I of ERISA, a regulation under ERISA Section 3(5) should be guided by ERISA’s purposes and appropriate policy considerations, including the need to expand access to healthcare and to respond to changes in law, market dynamics, and employment trends.”⁶ The same holds true here. The Department’s Association Retirement Plan rule should be guided by the need to expand access to retirement savings plans, consistent with the Executive Order.

⁵ Executive Order 13847 (Aug. 31, 2018).

⁶ 83 Fed. Reg. 28914 (June 21, 2018).

II. Neither ERISA Nor the Internal Revenue Code Include a “Nexus” or “Commonality of Interest” Requirement

The Department is advancing a position in the Proposal that restricts the scope of ERISA section 3(5) by distinguishing employer groups or associations that can act as an ERISA section 3(5) employer in sponsoring a multiple employer plan from those who cannot, by applying a “commonality of interest” requirement (as noted previously, the definition of “employer” in ERISA includes groups and associations acting “for” not “as” an employer with respect to an employee benefit plan). The Department’s interpretive position has been that a “commonality of interest” requirement “distinguishes bona fide groups or associations of MEPs from products and services offered by purely commercial pension administrators, managers, and record keepers.⁷ Yet, ERISA does not include nor support such distinctions.

The Department’s interpretation is inconsistent with the statute. ERISA section 3(5) defines the term employer as “any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.”⁸ ERISA section 3(5) does not require that there be a group or association of employers acting for an employer, it merely notes that such group or association is an example of a person that can act indirectly in the interest of an employer. The key word in the definition is the word “includes.” If Congress intended that only such group or association could be such person, it would not have used the word “includes.” Further, ERISA section 2530.210(c)(3) makes clear that, for purposes of ERISA, a “multiple employer plan” shall mean a multiple employer plan as defined in section 413(b) and (c) of the Code. Neither section 413(c) of the Code nor Treasury Regulation section 1.413-2 require a “unique nexus” between the employers that maintain a multiple employer plan. For purposes of the Code and therefore ERISA, a multiple employer plan is simply a plan maintained by more than one employer. No “nexus” is required.

Indeed, the Department has acknowledged that the law does not impose a “nexus” or commonality requirement. In the final Association Health Plan (AHP) rule, the Department states that “the terms ‘employer’ and ‘indirectly in the interest of an employer’ are ambiguous as applied to a group or association in the context of ERISA section 3(5) and the statute does not specifically refer to or impose the ‘commonality’ test on the determination of whether a group or association acts as the ‘employer’ sponsor of an ERISA-covered plan within the scope of ERISA section 3(5).”⁹

Moreover, the Department has concluded that it is not limited by its prior interpretations or case law in adopting a more flexible regulatory test. The Department has stated that neither its previous advisory opinions nor relevant cases have ever held that the Department is foreclosed from adopting a more flexible test or departing from the factors it previously relied upon in determining whether a group or association can be treated as acting as an “employer” or “indirectly in the interest of an employer,” for purposes of the statutory definition.¹⁰

⁷ 83 Fed. Reg. 53539 (Oct. 23, 2018).

⁸ See ERISA Section 3(5), 29 USC 1002(5).

⁹ See 83 Fed. Reg. 28914 (June 21, 2018).

¹⁰ See 83 Fed. Reg. 28914 (June 21, 2018).

III. The Department's Various Positions and Interpretations are Inconsistent with Law

As discussed above, neither ERISA nor the Internal Revenue Code include a “nexus” or “commonality of interest” requirement. The Department itself has concluded that the statute does not refer to or impose a commonality test on the determination of whether a group or association acts as the ‘employer’ sponsor of an ERISA-covered plan within the scope of ERISA section 3(5). Yet, as is illustrated below, the Department continues to impose such commonality requirements, in a random and situational manner, without a statutory basis for doing so.

The Original MEP Interpretation. With respect to MEPs, the Department originally opined that “where several unrelated employers merely execute identically worded trust agreements or similar documents as a means to fund or provide benefits, in the absence of any genuine organizational relationship between the employers, no employer group or association exists for purposes of ERISA section 3(5).”¹¹ Accordingly, the Department, in various advisory opinions, has applied a facts and circumstances approach to determine whether there is a sufficient common economic or representational interest or genuine organizational relationship for there to be a bona fide employer group or association capable of sponsoring an ERISA plan. The Department’s original analysis focused on three broad sets of issues:

- Whether the group or association is a bona fide organization with business/organizational purposes and functions unrelated to the provision of benefits;
- Whether the employers share some commonality and genuine organizational relationship unrelated to the provision of benefits; and
- Whether the employers that participate in the benefit program, either directly or indirectly, exercise control over the program, both in form and substance.

If an entity meets each of these requirements, the Department has concluded that it is appropriate to treat it as an “employer” within the meaning of ERISA section 3(5). In developing and applying this test, the Department improperly conflates a group or association of employers capable of acting as an employer with a group or association of employers capable of acting for an employer, with respect to an employee benefit plan.

The State-Sponsored Retirement Plans for Private Sector Employees Interpretation. In November 2015, the Department issued its second situational interpretation of the term “employer” for purposes of sponsoring a multiple employer plan. In Interpretive Bulletin 2015-02,¹² the Department set forth its views concerning the application of ERISA to state-sponsored retirement plans for private-sector employees and the options available to states under ERISA. One approach discussed by DOL is the use of an open MEP. In Interpretive Bulletin 2015-02, the Department concluded that a state has a “unique representational interest” in the health and welfare of its citizens that connects it to the in-state employers that choose to participate in the state-sponsored MEP, and accordingly, a state is considered to be “acting indirectly in the interest” of participating employers –

¹¹ See Advisory Opinion 94-07A, March 14, 1994.

¹² See Interpretive Bulletin Relating to State Savings Programs That Sponsor or Facilitate Plans Covered by the Employee Retirement Income Security Act of 1974, 80 Fed. Reg. 71936 (Nov. 18, 2015).

whether or not such employers meet the Department's existing "nexus" or "commonality of interest" requirement.

Accordingly, Interpretive Bulletin 2015-02 holds that states can establish and sponsor a MEP for more than one unrelated employer. Conversely, under the Department's second interpretation of the law, a person that is not a state may act "indirectly in the interest of an employer, in relation to an employee benefit plan" only if the person does so as "a group or association of employers acting for an employer" and only when the group or association of employers satisfies the Department's "nexus" and "commonality of interest" requirements.

Remarkably, in the context of a state-sponsored plan, the Department focused solely on when a state can act *for an employer* – and in a complete shift of policy, with respect to participating employers, correctly interpreted the law by eliminating any employer commonality requirement. This further illustrates that the Department's guidance in this area is situational, arbitrary, and has no basis in law.

The Association Health Plan Interpretation. On June 21, 2018, the Department issued its final AHP rule. The AHP rule implemented a third situational interpretation of the term "employer." In the AHP rule, the Department concluded that that, with respect to an AHP and a bona fide group or association of employers capable of establishing a group health plan, the commonality of interest test may be met if the employer members of the group or association are –

- In the same trade, industry, line of business or profession, or
- Located in a region that does not exceed the boundaries of the same state or same metropolitan area, even if the metropolitan area includes more than one state.

The final AHP Rule incorrectly included barriers to employer participation and failed to properly address when a group or association of employers could act for an employer with respect to an employee benefit plan.

The Association Retirement Plan Interpretation. The Department now proposes to modify and expand its original MEP interpretation. According to the Department, applying a similar understanding of a group or association of employers in the pension context as in the AHP context "promotes simplicity and uniformity in regulatory structure." Other than the promotion of "simplicity and uniformity" the Department offers no basis for using the same parameters to define the term "employer" for purposes of ARPs and AHPs. The Department is aware of the differences between health plans and retirement plans, but completely ignores any differences in the ARP proposal, without justification for doing so.

The Department's various interpretations regarding who may act "indirectly in the interest of an employer" in establishing an employee benefit plan, as well as its various employer "commonality of interest" requirements are at odds with the law. As noted above, ERISA section 3(5) does not require that there be a group or association of employers acting for an employer, it merely states that such group or association *is an example* of a person acting indirectly in the interest of an employer. When there is a group or association, the Department's changing, inconsistent, and situational views with respect to the employer "commonality of interest" requirement demonstrates the Department's view is not rooted in law but is arbitrary and situational.

ACLI recommends that the Department revoke its prior guidance and issue consistent guidance on MEPs to comport with the law. Such guidance should provide that it is sufficient that a person (as defined in ERISA 3(9)) establish that said person is acting indirectly in the interest of an employer in relation to an employee benefit plan, regardless of whether the person is or is not a group or association, with or without some employer “nexus” or “commonality of interest.” Such an interpretation would not only be consistent with law - but would be consistent with this Administration’s policy goal of expanding access to MEPs.

IV. There Is No Legal Basis For The Proposal’s Limitations on Employers

As with the AHP final rule, the ARP Proposal incorrectly includes commonality restrictions. Specifically, with respect to an ARP and a bona fide group or association of employers capable of establishing an association retirement plan, the commonality of interest test may be met if the employer members of the group or association are –

- In the same trade, industry, line of business or profession, or
- Located in a region that does not exceed the boundaries of the same state or same metropolitan area, even if the metropolitan area includes more than one state.

The Department provides no legal basis or justification for these arbitrary limitations. Similarly, it provided no legal basis or justification for these limitations in the AHP final rule. It is illogical that unrelated employers in different industries inside a single state or metropolitan somehow meet a “commonality” requirement while unrelated employers in different industries outside of a single state or metropolitan area do not. Under the ARP Proposal, for a business-based association to sponsor an ARP for any of its employer members, it can do so for employers regardless of its line of business so long as the employers are within a single state or metropolitan area. Otherwise, only employers that meet the commonality requirement can participate in the ARP. We find no basis in ERISA for these arbitrary limitations. ERISA is a federal – not a state-by-state or regional statute. Indeed, one of the tenets of ERISA is the provision of uniform nationwide rules and requirements for retirement plan administration. ERISA contains no limits as to whether employers may join together in sponsoring a retirement plan based on trade, industry, line of business, professional or geographic location.

Further, we find no basis in ERISA for the Proposal’s requirement that functions and activities of a “bona fide” group or association be controlled by its employer members and that the members that participate in the plan control the plan – in both form and substance. It appears that this carryover “control” requirement was included in the AHP proposal “both to satisfy ERISA’s requirements that the group or association must act for the employers in relation to the employee benefit plan, and to prevent formation of commercial enterprises that claim to be AHPs but that operate like traditional issuers selling insurance in the employer marketplace and may be vulnerable to abuse.”¹³ This appears to be based on the Department’s continuing concern about the potential abuse associated with Multiple Employer Welfare Arrangements (MEWAs). We see no relationship between past MEWA abuses identified by the Department and potential abuse by MEP sponsors. Indeed, the Department states in the preamble that it is “not aware of any direct information indicating whether the risk for fraud and abuse is greater in the MEP context than in other plans.”¹⁴

¹³ 83 Fed. Reg. 632 (Jan. 5, 2018).

¹⁴ 83 Fed. Reg 53555 (Oct. 23, 2018).

We therefore recommend that the Department reevaluate this provision to specify the type of control or responsibility it believes an employer must have with respect to those it engages to act indirectly on its behalf as it relates to an employee benefit plan.

V. Financial Service Providers Should Be Able To Sponsor An ARP

The Proposal prohibits a bank, trust company, insurance issuer, broker-dealer or other similar financial services firm (including pension record keeper and third-party administrators) from acting indirectly in the interest of an employer in relation to an employee benefit plan. This appears to have been based on carryover of the same requirement from the AHP rule, where the Department concluded, with respect to insurance companies, 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.”¹⁵ This prohibition should be eliminated.

As noted above, the statute does not have a strict employment-based limitation – in fact, the statutory definition of an “employer” includes any person acting directly as an employer or indirectly in the interest of an employer and includes an association of employers acting for an employer in such capacity. The phrase *indirectly in the interest of an employer* illustrates the lack of an employment-based limitation in the statute. The Department acknowledges this, stating in the preamble that “In a broad colloquial sense, it is possible to say that commercial service providers, such as banks, trust companies, insurance companies, and brokers act ‘indirectly in the interest of their customers, but that does not convert every service provider into an ERISA-covered ‘employer’ of their customer’s employees.” We agree. However, it is possible – and legally permissible - for a service provider to agree to assume the responsibilities of a plan sponsor, and thereby act indirectly in the interest of an employer – as contemplated by ERISA section 3(5). Finally, the Department fails to address or recognize the fact that some financial service providers already provide retirement plan services to groups of employers. It would certainly be easier and quicker, and therefore beneficial to Americans seeking to save for a secure retirement, for the Department to allow such providers to build on their current programs and have such programs treated as MEPs.

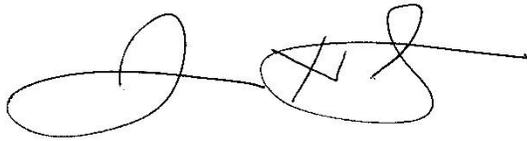
Finally, to the extent the Department is concerned about potential conflicts of interest associated with a service provider’s sponsorship of an ARP, such conflicts may be addressed through application of ERISA’s prohibited transaction rules and exemptions.

The NPRM discusses several of the proposal’s benefits including expanded access to coverage, reduced fees and administrative savings, reporting and audit cost savings, reduced bonding costs, increased retirement savings, improved portability, increased labor market efficiencies, and equality among workers saving for retirement. The depth and breadth of these potential benefits illustrates the unique opportunity the Department has, with the current Administration’s support, to have a meaningful and positive impact on Americans’ ability to save for a secure retirement. We urge the Department to take full advantage of this opportunity through regulation and guidance that supports open MEPs, without restrictions, consistent with ERISA’s statutory language.

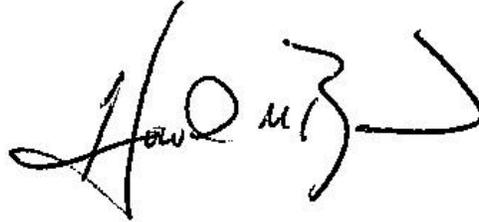
¹⁵ See 83 Fed. Reg. 53539 (Oct. 23, 2018).

On behalf of the ACLI member companies, thank you for your consideration of these comments. We welcome the opportunity to discuss these comments and engage in a productive dialogue with the Department.

Respectfully,

A handwritten signature in black ink, appearing to read "J. Szostek". The signature is fluid and cursive, with a large initial "J" and a stylized "S".

James H. Szostek

A handwritten signature in black ink, appearing to read "Howard M. Bard". The signature is cursive and includes the full name "Howard M. Bard" written out in a stylized manner.

Howard M. Bard