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**STATE OF VERMONT**  
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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 N.W.  
Washington, DC 20210

**RIN 1210-AB88**

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

To Whom it May Concern:

Thank you for the opportunity to comment on the proposed rule: *Definition of “Employer” Under Section 3(5) of ERISA—Association Retirement Plans and Other Multiple-Employer Plans*, 83 Fed. Reg. 53,534 (Oct. 23, 2018) (Proposed Rule). As the State Treasurer of Vermont, I write on behalf of myself and the Green Mountain Secure Retirement Plan Board, for which I serve as Chair.

I write largely out of an abundance of caution, to ensure that nothing in the Proposed Rule (or its Preamble) was intended to affect a State’s ability to sponsor a multiple employer plan (MEP), the authority for which is described in the Employee Benefits Security Administration’s (EBSA) *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. 71,936 (Nov. 18, 2015) (2015 Bulletin).

As I will discuss below, Vermont has decided to adopt and implement a voluntary Green Mountain Secure MEP based on the interpretations set forth in the 2015 Bulletin, and the State has expended significant efforts on program development and implementation. While I believe that the Proposed Rule is best read to have no effect on Vermont’s ability to sponsor a MEP, certain statements in the Preamble to the Proposed Rule have provided cause for concern.

Accordingly, I write to request clarification that any Final Rule promulgated in this proceeding explicitly provide that a state’s ability to sponsor a MEP, as that ability is described in the 2015 Bulletin, is unaffected by the rule, and that states are not subject to the criteria for bona fide groups or associations set forth in proposed 29 C.F.R. § 2510.3-55(b).



## **Background**

### **Public Retirement Plan Study Committee**

In 2014, the Vermont General Assembly created a Public Retirement Plan Study Committee (Committee) to study the feasibility of establishing a public retirement plan. *See* 2014 Acts & Resolves No. 179, Sec. C.108, *as amended by* 2015 Acts & Resolves No. 58, Sec. C.100, *as further amended by* 2016 Acts & Resolves No. 157, Sec. F.1, *as further amended by* 2017 Acts & Resolves No. 69, Sec. C.2. The Committee was composed of public officials and private citizens that represented different groups with an interest in retirement security. The overarching goal of the Committee was to increase retirement security for all Vermonters.

During 2014 and 2015 the Committee met on six occasions and collected resources regarding retirement security from a variety of sources including the Center for Retirement Initiatives at the McCourt School of Public Policy of Georgetown University, AARP, Vermont Main Street Alliance, Vermont Businesses for Social Responsibility, Central Vermont Chamber of Commerce, American Council for Life Insurers, National Institute on Retirement Security, Vermont Bankers Association, Vermont State Employees' Association, VSEA Retirees-Chapter, Vermont-National Education Association, Assets & Opportunity Scorecard, Vermont business owners, the U.S. Department of Labor (DOL), and other stakeholders.

Early in 2017, at the beginning of the legislative session, the Committee recommended to the Vermont General Assembly that the State implement a voluntary open MEP supplemented by an open retirement marketplace for employees not covered by the State-implemented MEP or other existing retirement options. *See* Memorandum from Beth Pearce, State Treasurer to the General Assembly regarding *Interim Study of the Feasibility of Establishing a Public Retirement Plan Required by Act 157 of the 2016 Legislative Session*, at 1 (Jan. 6, 2017).

Later in 2017, the General Assembly authorized the Green Mountain Secure Retirement Plan through the passage of Act 69. The relevant portion of Act 69 is available on the Vermont State Treasurer's website at: <https://www.vermonttreasurer.gov/sites/treasurer/files/public-pension-study-group/ACT069%20As%20Enacted.pdf>.

### **Green Mountain Secure Retirement Plan**

Following the extensive study and outreach effort described above, the Vermont General Assembly passed legislation providing for the following: "The State of Vermont shall, consistent with federal law and regulation, adopt and implement a voluntary Multiple Employer Plan (MEP) public retirement plan, which shall remain in compliance with federal law and regulations once implemented, and shall be called the 'Green Mountain Secure Retirement Plan.'" 2017 Acts & Resolves No. 69, Sec. C.2., Subsec. (a).

The legislation sets forth 12 guiding principles that govern the design and implementation of Green Mountain Secure. *Id.*, Subsec. (b). Key among those principles are that the Plan is voluntary. *Id.*, Subsec. (b)(8). Specifically, the General Assembly determined that while autoenrollment should be used to increase participation, employees of employers who join



the Plan should be permitted to opt out of participation. The General Assembly also determined that Green Mountain Secure should be a new solution for an under-served market, rather than a competitor to an effective one. Accordingly, the General Assembly set a cap on employer size—limiting participation to employers with 50 employees or fewer and who do not currently offer a retirement plan to their employees—and it set a principle that the Plan should be “[a]dditive not duplicative: the Plan should not compete with existing private sector solutions.” *Id.*, Subsec. (b)(11) & (c)(1)(A).

As these provisions suggest, the Green Mountain Secure Retirement Plan is meant to complement the products and services that are currently offered in the marketplace and provide a simple, straightforward path for Vermonters to begin saving for a secure retirement. It is not a mandate, and its success will be driven by the value it can provide to small employers who want to provide their employees with a retirement savings option that is easy to understand, trustworthy, and price competitive.

With respect to Plan governance, the Green Mountain Secure Retirement Plan is overseen by a 7-member Board. *Id.*, Subsec. (c)(5)(B). As State Treasurer, I serve as Chair of the Board. The remaining members are appointed by different public officials. The Board is authorized to set program terms, prepare and design plan documents, and appoint an administrator to assist in the selection of investments, managers, custodians, and other support services. *Id.*, Subsec. (c)(5)(A).

To date, the Board has met a number of times to discuss implementation of the Green Mountain Secure Retirement Plan. As the sponsor of the Green Mountain Secure Retirement Plan, the Board is in the late stages of retaining a third-party Plan Administrator to implement the plan. Per the governing legislation, the Board’s goal has been to launch the Plan in January 2019. *Id.*, Subsec. (d).

### **Comments**

On October 23, 2018, EBSA published the Proposed Rule in the Federal Register. We understand the purpose of the Proposed Rule is to expand access to workplace retirement plans by clarifying requirements for “groups or associations of employers” and professional employer organizations to sponsor MEPs.

In my capacity as both the Vermont State Treasurer and Chair of the Green Mountain Secure Retirement Board, I would like to commend EBSA for its focus on this important issue. Retirement security is a critical issue for all Americans. The Proposed Rule recognizes the challenge of increasing access to workplace retirement plans, and it takes important and meaningful steps to increase the accessibility of MEPs.

As we recognized in Vermont, the MEP structure allows for cost efficiencies through economies of scale: so a small business can provide a workplace retirement solution to its employees at a cost that is competitive for both the employer and the employees. It also allows for greater flexibility than other potential retirement solutions in terms of contribution limits and investment options. I am pleased to see EBSA recognizing a similar potential in the



expanded availability of MEPs, and I am encouraged by the steps it is taking in the Proposed Rule to facilitate that expansion.

While I support the goal of the Proposed Rule, I write to urge EBSA to clarify that any Final Rule does not affect a state's ability to sponsor a MEP, as discussed in the 2015 Bulletin.

As noted above, the 2015 Bulletin sets forth DOL's views "concerning the application of ERISA to certain state laws designed to expand the retirement savings options available to private sector workers through ERISA-covered retirement plans." 2015 Bulletin, 80 Fed. Reg. 71,936, at 71,937 (Nov. 18, 2015). Specifically, the 2015 Bulletin described a MEP approach as a state-sponsored initiative, which in DOL's view "interact[s] with ERISA in such a way that section 514 preemption principles and purposes would not appear to come into play in the way they have in past preemption cases." *Id.*, 80 Fed. Reg. at 71,939.

The 2015 Bulletin provided the State of Vermont with a path to move forward with the Green Mountain Secure Retirement Plan. As the Board works through the process of planning and implementation, it is doing so with a firm eye on DOL's discussion in the 2015 Bulletin. Specifically, the Green Mountain Secure Retirement Plan would have the Board as its sponsor, consistent with language in the 2015 Bulletin providing for the State, or a designated governmental agency or instrumentality, to be a plan sponsor under ERISA section 3(16)(B).

Our concern is limited to the use of the potentially confusing term "subregulatory guidance" in the Preamble to the Proposed Rule. For example, the Proposed Rule states that it "would supersede subregulatory interpretative rulings under ERISA section 3(5)..." Proposed Rule, 83 Fed. Reg. at 53,536. Furthermore, in describing the proposed regulatory text setting forth the requirements for "bona fide groups and associations," the Proposed Rule states, "[t]his paragraph would replace and supersede criteria in prior subregulatory guidance." *Id.* at 53,539.

We recognize that the "subregulatory guidance" referred to in the Preamble to the Proposed Rule likely does not extend to the 2015 Bulletin. First, the Proposed Rule makes no explicit mention of the 2015 Bulletin. Second, the Proposed Rule appears to be squarely focused on the private sector and does not address state sponsored savings programs. And third, the tenor of the Proposed Rule is to expand the accessibility of MEPs by clarifying and expanding, rather than restricting, the types of groups, associations, and professional employer organizations that may sponsor a MEP. For these reasons, I believe that the best reading of the Proposed Rule is to hold harmless the 2015 Bulletin.

However, the Proposed Rule does introduce an element of uncertainty as we prepare for the launch of Green Mountain Secure. Accordingly, we respectfully request that in promulgating a Final Rule, EBSA confirm that a state's ability to sponsor a MEP, as that ability is described in the 2015 Bulletin, is unaffected by the proposed regulatory language. I would further ask that EBSA clarify that, given the unique characteristics of a state MEP sponsor—specifically its "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 MEP and their employees," 2015 Bulletin, 80 Fed. Reg. 71,936, at 71,939—the proposed regulatory language set forth in the Proposed Rule does not apply to state sponsors of MEPs.



Again, please accept my sincere appreciation of EBSA's efforts to expand access to workplace retirement savings plans. I would be happy to provide any further information on the Green Mountain Secure Retirement Plan that would be helpful or respond to any inquiries that you may have.

Sincerely,

A handwritten signature in black ink that reads "Beth Pearce". The signature is written in a cursive style.

Beth Pearce  
Vermont State Treasurer  
Chair, Green Mountain Secure Retirement Board