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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

Dear Sir or Madam:

Transamerica appreciates the opportunity to provide comments in response to the Notice of Proposed Rulemaking (“NPRM”) 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”).

Transamerica is focused on helping customers achieve a lifetime of financial security. Transamerica products and services help people protect against financial risk, build financial security and create successful retirements. Transamerica designs customized retirement plan solutions for both for profit and non-profit businesses nationwide. Transamerica provides services for over 29,000 plans that collectively include over 7 million participants and represent over \$476 billion in plan assets as of December 31, 2017. Multiple Employer Plans comprise 250 of these plans for approximately 15,000 employers, with an aggregate balance of roughly \$24 billion. Transamerica has a predominant share of the PEO and association MEP markets, with a 24% and 27% share, respectively.¹

Summary

Transamerica welcomes the Department’s proposal to expand coverage through Association Retirement Plans (“ARPs”). As more fully explained below:

1. Expanding the ability of employers to join in offering a retirement plan will increase coverage.

¹ As of December 31, 2017, in the PEO market, Transamerica administers 345 plans aggregating \$12.3 billion in assets under management. In the Association market, Transamerica administers 81 plans totaling \$15 billion in assets under management with \$1.2B in cash flow.

2. Transamerica fully supports the Department's determination that Professional Employer Organizations constitute "employer" under ERISA.
3. Financial Services companies should be allowed to sponsor ARPs.
4. The commonality or nexus requirement for employers participating in ARPs should be eliminated.
5. Working owners should be permitted to join an ARP in their capacity as both employer and employee.
6. The Department should confirm in the final rule that employers participating in ARPs should not be subject to joint and several liability for the ARP.

MEPs Provide Opportunities for Expanding Retirement Plan Coverage

Employer-sponsored defined contribution plans play a critical role in facilitating employee savings. The workplace retirement savings system has succeeded in serving as the preferred method of saving for retirement for millions of workers. With the benefits of saving in an employer-sponsored plan governed by ERISA (e.g., investment education, the potential for employer contributions, and fiduciary oversight), combined with the convenience of automatic payroll deduction, Americans are far more likely to save for retirement through participating in a workplace-sponsored retirement plan than through alternate savings structures. According to research from nonprofit Transamerica Center for Retirement Studies® (TCRS), 89 percent of workers who are offered a 401(k) or similar plan are saving for retirement, either through the plan and/or outside of work, compared to just 49 percent of workers are not offered such a plan.²

For employers, especially small businesses, for which a stand-alone defined contribution plan is not feasible, the MEP offers an attractive solution by addressing the primary reasons that employers do not establish workplace retirement savings plans for their workers: cost, administrative burden and fiduciary liability concerns.

The TCRS 18th Annual Retirement Survey of employers found that while 92 percent of large companies with 500 or more employees and 86 percent of medium-sized companies with 100 to 499 employees offer a retirement plan, only 59 percent of small companies with five to 99 employees do so. Among companies that do not offer a 401(k) or similar plan, only 27 percent say that they are likely to begin sponsoring a plan in the next two years. Among those not planning to do so, their most frequently cited reasons are: company is not large enough (58 percent), concerns about cost (41 percent), and company or management is not interested (22 percent). However, *an encouraging indicator is that 25 percent of those not likely to offer a plan say that they would consider joining a multiple employer plan (MEP) offered by a vendor*

² Nonprofit Transamerica Center for Retirement Studies® ("TCRS"), *Wishful Thinking or Within Reach? Three Generations Prepare for Retirement*, 18th Annual Transamerica Retirement Survey of American Workers, p. 98: https://transamericacenter.org/docs/default-source/retirement-survey-of-workers/tcrs2017_sr_threegenerations_prepare_for_retirement.pdf. TCRS is a division of Transamerica Institute® ("The Institute") a nonprofit, private foundation. The Institute is funded by contributions from Transamerica Life Insurance Company and its affiliates may receive funds from unaffiliated third parties.

*who handles many of the fiduciary and administrative duties at a reasonable cost.*³ [emphasis added]

The cost advantage of a MEP is realized by achieving economies of scale, both in terms of the number of plan participants and assets. Additional savings are achieved by spreading the cost among all the participating employers in the MEP. While the actual cost savings will depend on the number of participants, total assets, demographics of underlying adopting employers in a MEP and other variables, the savings in the MEP will grow with scale.

The liability and administrative advantages are achieved by delegating to a professional named fiduciary and plan administrator, respectively, the responsibility for operating the MEP. By delegating the responsibilities to professionals with the expertise and systems to operate and comply with legal requirements of operating a MEP, the quality of the MEP market is enhanced.

The President has acknowledged and supported the role of the MEP in expanding coverage by its August 31, 2018 Executive Order on Strengthening Retirement Security in America. The Executive Order states that it is the policy of the Federal Government to expand access to workplace retirement plans for American workers and it directs the Department of Labor (“DOL”) and the Treasury Department (“Treasury”) to revise or eliminate rules that impose costly regulatory burdens and complexity on businesses, especially small businesses, in establishing workplace retirement plans. The Executive Order specifically calls for consideration of open MEPs.

PEOs can operate as sponsors of ARPs

Transamerica welcomes and fully supports the NPRM confirmation that a PEO is a “bona fide professional employer organization” which can act indirectly as an employer in sponsoring a MEP covering the employees of client employers. In this respect, Transamerica endorses the points raised by The National Association of Professional Employer Organizations (NAPEO), dated December 24, 2018, that directly relate to support of the NPRM’s formalization of the legal framework for PEOs to provide 401(k) retirement benefits for their clients’ shared employees.

The Department’s confirmation that a PEO is a bona fide professional employer organization under ERISA section 3(5) is consistent with Internal Revenue Code Section 413(c) and regulations thereunder, which provide that a PEO may offer a MEP for its clients under the Code. Pursuant to section 413(c) and the regulations thereunder, for purposes of certain qualification requirements, all employees of each of the employers maintaining a MEP (participating employers) are treated as being employed by a single employer.

³ Nonprofit Transamerica Center for Retirement Studies® (“TCRS”), *Striking Similarities and Disconcerting Disconnects: Employers, Workers, and Retirement Security*, 18th Annual Transamerica Retirement Survey, 2018, p. 43: https://www.transamericacenter.org/docs/default-source/retirement-survey-ofemployers/tcrs2018_sr_employer-retirement-research.pdf

The Department further notes that the determination of whether a PEO can sponsor a MEP hinges on the determination of whether a PEO is an employer or acts indirectly as an employer in relation to an employee benefit plan. The Department confirms that a PEO acts indirectly in the interest of an employer when it performs substantial employment functions on behalf of its client employers. These functions typically include payment of wages; reporting and withholding federal employment taxes; providing workers' compensation coverage; certain integral human resources functions; and certain regulatory compliance functions.

As the PEO essentially serves as a human resource company that contractually assumes certain employer responsibilities of its client employer, it is only common for the employer client to also contract with the PEO for its sponsorship of a MEP in which its employees can participate. In fact the types of employers who typically contract with a PEO are generally those that are best suited to the benefits of a MEP in that they are smaller employers that do not have the administrative expertise or funds to operate their own retirement plan for their employees. Confirmation that a PEO can sponsor a MEP is widely supported by the goals of MEPs themselves, as well as the Executive Order, to expand coverage.

Financial Services Companies Should be Permitted to Sponsor an ARP

In addition to PEOs, financial services firms should be permitted to act as plan sponsor for an ARP. This is regardless of whether the Department determines that a financial services company can form a bona fide group or association. This position is supported by the Department's finding that PEOs and States can sponsor a MEP. In its discussion of whether a PEO can act as MEP sponsor, the Department in the NPRM indicated that whether a PEO is an "employer" under section 3(5) depends on the "indirectly in the interest of an employer" provision, not the "employer group or association" provision.

Yet, the NPRM provides that a bona fide group or association of employers cannot be one that is formed by a bank or trust company, insurance issuer, broker-dealer, or other similar financial services firm (except to the extent that such an entity participates in the group or association in its capacity as an employer member of the group or association).

The Department's exclusion of financial services firms, including record keepers and other plan service providers, from serving as plan sponsor is without any basis in law and is contradictory to the intent of the NPRM and Executive Order.

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."⁴ The definition of employer is not limited to a group or association of employers acting for an employer, it merely notes that that definition includes such a group or association (i.e, the group or association is an example of a person acting indirectly in the interest of an employer). The only two requirements of a person acting indirectly as employer in ERISA Section 3(5) is that the person (1) act in the interest of the employer and (2) in relation to an employee benefit plan.

⁴ See ERISA Section 3(5), 29 USC 1002(5).

The Department explains its exclusion of financial services firms as a bona fide employer organization as consistent with the position it took in its Association Health Plan (“AHP”) rule promulgated in June 2018 that a health insurer could not sponsor a health plan. However, the Department has indicated in its AHP rule that it is not limited by its prior interpretations or case law in adopting a more flexible regulatory test. In addition, such consistency is not warranted given the differences between health and retirement plans. Unlike health plans, the assets of a MEP are fully funded and held in a trust and therefore MEPs are not subject to the abuse and underfunding concerns that are associated with health insurance plans.

A financial services firm that sponsors a retirement plan becomes a fiduciary of the plan and its participants. Its rights and responsibilities, as well as those of the businesses joining the ARP, will be spelled out in a participation agreement. To the extent that the Department is concerned about conflicts of interest, ERISA addresses this through the prohibited transaction rules that prohibit certain transactions with parties in interest and prevent fiduciaries from self-dealing. If the Department believes that financial services firms serving in the role of plan sponsor should meet specific criteria, Transamerica suggests that it appropriate to use the criteria outlined in the letter by the Groom Law Group comment letter on the NPRM on behalf of a coalition of investment managers, record keepers, third party administrators, and trustees, dated December 21, 2018.

Permitting financial services firms to serve as plan sponsors is consistent with, and arguably essential to the goal of expanding access to workplace retirement plans and consistent with the goal of ERISA in ensuring plan participants are protected. Financial services firms are qualified and uniquely positioned to maintain and operate an ARP. Financial services firms such as insurers are heavily regulated and licensed under applicable law. Financial services firms must meet capital and other standards to ensure their continued operation. In addition, financial services firms, such as record keepers, have significant experience and expertise in asset management, and in acting as fiduciaries in accordance with ERISA. They have the requisite experience, expertise, fiduciary capacity and other qualifications to act as an ARP sponsor.

Elimination of the nexus or commonality requirement is also essential to carry out the intent of the Executive Order.

The NPRM requires that employers that participate in an ARP must either be in the same trade, industry, line of business or profession or have a principal place of business in the same region that does not exceed the boundaries of a single State or metropolitan area. The Department maintains that this “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.

The Department’s stated reason for maintaining the commonality of interest is on its face mistaken. Financial services companies that wish to act indirectly as an employer are not doing so as a commercial pension administrator, manager or record keeper. Financial services

companies wishing to act as ARP Plan sponsors step into the role of an employer, incur fiduciary liability and are required to act in the interest of the plan participants.

In addition, as noted above, there is no basis for eliminating financial services firms as a bona fide group to serve as plan sponsor. In fact, financial services firms are eminently qualified to act as an ARP plan sponsor.

This requirement is contrary to the Executive Order's direction to eliminate rules that impose costly regulatory burdens and complexity on businesses in establishing workplace retirement plans, and has no basis in ERISA. In fact the nexus or commonality requirement has for years in policy discussions been accepted as serving no policy reason for a MEP, and, along with the one bad apple rule, is cited as the primary reason for preventing wider use of MEPs as the ideal vehicle for enhancing coverage, especially among small employers.

Working Owners, as Self-Employed Individuals, Should be Permitted to Participate in an ARP

Transamerica welcomes and supports the NPRM's conclusion that a working owner without common law employees may qualify as both an employer and an employee of a trade or business if certain requirements related to hours worked, wages paid and income are met.

MEPs are an effective vehicle for providing working owners (often referred to as self-employed, independent or gig economy workers) access to a workplace retirement savings plan. Working owners may be sole proprietors or partnerships, and as such can set up a qualified retirement plan. As such they can join with others in a MEP to achieve economies of scale and avoid the administrative burden and liability in running the plan.

Policymakers and the market have focused on how to best provide to independent workers the benefits of workplace benefits given their rise. According to one study, independent workers have risen by 9.4 million over the last decade.⁵ These workers include not only recent graduates but also workers displaced by unemployment and workers who have retired from traditional employment. According to the Aegon Retirement Readiness Survey 2016: Retirement Preparations in a New Age of Self-Employment, 94% of those surveyed cite positive reasons for becoming self-employed.⁶

Independent workers are effectively small businesses, e.g., a sole proprietorship with no workers aside from the "owner." According to the U.S. Small Business Administration, the number of small businesses in the United States has increased 49 percent since 1982. Since 1990, as big business eliminated 4 million jobs, small businesses added 8 million new jobs. Small businesses

⁵ Katz, Lawrence F., and Alan B. Kreger. The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015. Rep. Princeton University, 29 Mar. 2016. Web.

⁶ The Aegon Retirement Readiness Survey 2016: Retirement Preparations in a New Age of Self-Employment <https://www.aegon.com/contentassets/989fa61f841d42b6957e39cf3183dba3/united-states-self-employed-retirement.pdf> also notes 56% of self-employed workers surveyed in the U.S. indicate that they expect to retire after age 65 or never, and have a median personal income of \$46,000.

(fewer than 500 employees) represent 99.9 percent of the total firms and 48 percent of the private sector workforce in the United States.⁷ Expanding retirement plan coverage among independent workers and other small businesses is critical to enhancing Americans' retirement security.

However, any requirement of commonality or nexus would significantly undercut the benefit of confirming that working owners can serve as both an employer and employee. Such working owners will not typically belong to the same trade or business and may not work in the same geographic area. The common bond of these working owners is that they are both the employer and employee and as such, and could benefit from the economies of scale, efficiencies and ERISA protections of an effectively managed plan, the costs of which are shared by the various employers participating in the MEP or ARP.

The NPRM Should Specify that Employers Participating in the ARP are Not Jointly Liable

The preamble to the NPRM notes that nothing in the proposed rule is to suggest that participating in a MEP gives rise to joint employer status under any federal or State law, rule or regulation. However, this confirmation of no joint liability is not included in the proposed rule itself. The Department is urged to include such statement.

Open MEP Legislation is Needed

Transamerica appreciates the Department's limitations in what it can do by regulation. As legislation permitting open MEPs will hopefully be enacted early next year, we look forward to also working with the Department on any issues to be dealt with by regulation. The clarifications that will be provided in final rule on Association Retirement Plans are a good first step in that direction. Open MEPs are a significant tool in helping more businesses provide retirement plans for their employees, as well as working owners to save for retirement.

Conclusion

Transamerica appreciates your consideration of these comments. Expanding retirement plan coverage among small businesses and working owners is a critical to enhancing retirement security of individuals.

Sincerely,



Deborah Rubin
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⁷ U.S. Small Business Administration, Frequently Asked Questions, June 2016
https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf