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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

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

To Whom it May Concern:

The Insured Retirement Institute (“[IRI](http://www.IRlonline.org)”)¹ appreciates the opportunity to provide these comments to the Department of Labor (the “[Department](http://www.dol.gov)”) in response to the Department’s proposal to adopt a new rule (29 CFR §2510.3-55) (the “[Proposal](http://www.dol.gov)”) to clarify “the circumstances under which an employer group or association or a professional employer organization (PEO) may sponsor a workplace retirement plan.”² IRI and our members commend the Department for undertaking this effort to expand access to affordable quality retirement saving options. While we generally support the Proposal, we believe the Department can and should extend the Proposal beyond its current parameters to allow greater opportunities for small businesses

¹ IRI is the only national trade association that represents the entire supply chain of the retirement income industry. IRI has more than 500 member companies, including major life insurance companies, broker-dealers, banks, and asset management companies. IRI member companies account for more than 95 percent of annuity assets in the United States, include the top 10 distributors of annuities ranked by assets under management, and are represented by more than 150,000 financial professionals serving over 22.5 million households in communities across the country.

² 83 FR 53534 (October 23, 2018).

to participate in multiple-employer defined contribution pension plans. Our views on the Proposal are set forth in greater detail below.

Multiple Employer Plans Could Significantly Expand Access to Employment-Based Retirement Savings Opportunities.

As the Department has recognized, a retirement coverage gap exists in America today. Tens of millions of Americans do not have access to a retirement plan at work, leaving many ill-prepared to meet their financial needs after they stop working. This gap is most acute among employees of small businesses, many of whom do not sponsor plans due to concerns about costs, complexity, and fiduciary liability. As a result, IRI strongly supports action to expand workers' access to retirement plans through multiple employer plans.

The Proposal is aimed at increasing access to multiple employer plans ("MEPs") for small employers and their employees, providing millions of hard-working Americans with access to the workplace retirement plans they need to prepare for financial security in retirement. MEPs enable small businesses to participate in professionally administered plans through which they can benefit from economies of scale with limited fiduciary responsibilities. As a result, employees of these organizations would have access to the same retirement savings opportunities already enjoyed by employees of large companies on a near universal basis through 401(k)s and similar defined contribution plans.

Currently, many small businesses are reluctant to take on the complex legal, financial, and administrative risks and challenges inherent in sponsoring their own retirement savings plans. Easing the existing restrictions on access to MEPs would greatly increase access to professionally managed, institutionally priced retirement programs funded through convenient payroll deduction. As an added benefit, small employers could more effectively compete with larger employers who can more easily assume the costs and responsibilities associated with sponsoring retirement plans.

In sum, MEPs will: (1) reduce costs and administrative burdens often borne by the plan's participants and beneficiaries; (2) allow for greater retirement savings by employees; (3) reduce legal risks of fiduciary responsibilities for small employers sponsoring retirement plans as those will be discharged by plan and investment professionals thereby enhancing the fiduciary and other protections afforded to employees; (4) provide better retirement outcomes for employees by promoting the use of automatic enrollment and automatic escalation of their contributions; (5) offer a choice of investment options selected by investment professionals, better ensuring that plan participants will be able to tailor their portfolios to their investment goals and tolerance for risk; and (6) present enhanced opportunities for cost-effective participant education programs through pooling of resources with other employers.

The Proposal Should Be Expanded to Encourage Broader Use of MEPs.

1. The Commonality Requirement Should be Eliminated.

Under current law, a group or association of employers may only sponsor a MEP if, among other things, the employers “share some commonality and genuine organizational relationship unrelated to the provision of benefits.”³ This commonality requirement has proven to be a substantial barrier for many small employers. The Department has attempted to ameliorate this barrier in the Proposal by permitting a group or association of employers to satisfy the commonality requirement if they “(A) are in the same trade, industry, line of business or profession; or (B) [have] a principal place of business in the same region that does not exceed the boundaries of a single State or a metropolitan area...”⁴ While this is a step in the right direction, it does not go nearly far enough.

The preamble to the Proposal asserts that the commonality requirement is intended “to distinguish between groups and associations that act as employers within the meaning of ERISA section 3(5), from other entities that do not act as an ‘employer.’”⁵ This is necessary, according to the preamble, because “the Department’s authority to define ‘employer’ and ‘group or association of employers’ under ERISA section 3(5) does not broadly extend to arrangements established to provide benefits outside the employment context and without regard to the members’ status as employers.”⁶

We strongly disagree with the assertion that the commonality requirement is necessary to ensure that the Department does not exceed its jurisdiction under ERISA. In our view, several of the other criteria in the proposed definition of “bona fide group or association of employers” would effectively ensure that the Proposal could not extend beyond the employment context. In particular, subsection (b)(1)(ii) of the Proposal requires that each member of the group or association be “a person acting directly as an employer of at least one employee who is a participant covered under the plan.” Moreover, subsection (b)(1)(vi) restricts participation in a MEP to “employees and former employees of employer members, and their beneficiaries.”

Taken together, we believe these two criteria are sufficient to ensure that the regulation does not exceed the Department’s jurisdiction under ERISA. The inclusion of the commonality criteria, then, would serve only to impair the effectiveness of the Proposal in achieving the Department’s stated goal of expanding access to affordable quality retirement saving options.

Based on the foregoing, we respectfully urge the Department to eliminate the commonality requirement for MEPs sponsored by a group or association of employers under the Proposal.

³ 83 FR 53537.

⁴ 83 FR 53560.

⁵ 83 FR 53539.

⁶ *Id.*

2. Financial Services Firms Should Be Permitted to Sponsor MEPs.

A robust and competitive MEP marketplace must be permitted to develop if the the Proposal is to achieve its goal of expanding plan coverage. We are concerned, however, that there are not a sufficient number of groups or associations of employers, even with the revised standard contemplated by the Proposal, to address the problem in any meaningful way. Financial services companies such as banks, insurance companies and broker-dealer firms are well-positioned to offer high quality, low cost MEPs that could serve the vast number of small employers that do not currently offer retirement plans for their employees.

Unfortunately, Section (b)(1)(vii) of the Proposal would prevent financial services companies such as banks, insurance companies and broker-dealer firms from sponsoring MEPs. In our view, this prohibition is inconsistent with, and would significantly interfere with, the Department's stated goal in issuing the Proposal. According to the preamble, "[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." We strongly disagree with this conclusion.

As the Department notes in the Proposal, "annual reporting costs and exposure to potential fiduciary liability [are] major impediments to plan sponsorship....For a small business, in particular, a MEP may present an attractive alternative to taking on the responsibilities of sponsoring or administering its own plan."⁷ Regardless of whether the MEP sponsor is a local chamber of commerce, a PEO, or a financial services company, the MEP sponsor would be subject to the same fiduciary obligations and assume the same administrative responsibilities. As such, employers and their employees would face no greater risk if they choose to participate in a MEP sponsored by an insurance company as compared to a MEP sponsored by a PEO. As a fiduciary, the MEP sponsor would be subject to the prohibited transaction rules and all of ERISA's other consumer protections.

On the other hand, allowing a financial services firm to sponsor a MEP could provide significant benefits to employers and their employees. By their nature, financial services firms would bring far more direct expertise in financial matters to this role than other types of entities. Moreover, many employers already have existing relationships with financial services firms, thereby providing an existing pathway for information about MEPs to flow to small businesses and their employees about opportunities to join MEPs. As the Department knows all too well, one of the most significant barriers to increasing retirement savings in this country is a lack of knowledge about the importance of retirement planning and about opportunities to build an adequate nest egg. If banks, insurers, and broker-dealers are permitted to sponsor MEPs, they could

⁷ 83 FR 53535.

leverage those existing relationships to improve financial literacy and encourage more Americans to save for retirement.

Based on the foregoing, we respectfully urge the Department to eliminate the prohibition on MEP sponsorship by financial services companies.

Conclusion

A cost-effective, easy-to-use workplace retirement savings program is an important tool for building retirement security. Reducing the number of workers without access to a workplace plan should be a top priority for the Department. Revamping the rules and regulations to allow for MEPs to meet the needs and concerns of small employers would help to close the retirement coverage gap and improve the retirement outlook for millions of working Americans.

Therefore, as the Department considers increasing options for small businesses to offer retirement savings programs for their employees, IRI supports the Proposal and strongly urges the Department to further expand access to retirement plans by small businesses through open MEPs. We are committed to working with the Department to provide research, information and additional comments to improve retirement security for all Americans.

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Thank you again for the opportunity to comment on the Proposal. If you have questions about anything in this letter, or if we can be of any further assistance as the Department moves through the rulemaking process, please feel free to contact the undersigned at jberkowitz@irionline.org or 202-469-3014.

Sincerely,



Jason Berkowitz
Vice President & Counsel, Regulatory Affairs
Insured Retirement Institute (IRI)