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**Submitted via Federal eRulemaking Portal: [www.regulations.gov](http://www.regulations.gov)**

October 29, 2019

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

**Re: "Open MEPs" and Other Issues Under Section 3(5) of ERISA  
RIN 1210-AB92**

To Whom It May Concern:

On behalf of our members, the Insured Retirement Institute ("IRI")<sup>1</sup> appreciates the opportunity to provide these comments to the Department of Labor (the "Department") in response to the Department's Request for Information (the "RFI") regarding Open Multiple Employer Plans ("MEPs") and other issues under Section 3(5) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA").<sup>2</sup> The RFI poses a number of important questions intended to assist the Department in assessing "whether to amend its existing regulations to facilitate the sponsorship of 'open MEPs' by persons acting indirectly in the interests of unrelated employers whose employees would receive benefits under such arrangements."<sup>3</sup> We believe the Department should undertake such rulemaking in order to make retirement savings vehicles available to significantly more American workers. Our views on the questions posed in the RFI are set forth in greater detail below.

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<sup>1</sup> IRI is the leading association for the entire supply chain of insured retirement strategies, including life insurers, asset managers, and distributors such as broker-dealers, banks and marketing organizations. IRI members account for more than 95 percent of annuity assets in the U.S., the top 10 distributors of annuities ranked by assets under management, and are represented by financial professionals serving millions of Americans. IRI champions retirement security for all through leadership in advocacy, awareness, research, and the advancement of digital solutions within a collaborative industry community.

<sup>2</sup> 84 FR 37545 (July 31, 2019).

<sup>3</sup> Id.

### **The Department Should Eliminate the Commonality Requirement.**

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.

MEPs enable small businesses to participate in professionally administered plans through which they can benefit from economies of scale with limited fiduciary responsibilities, providing their employees with access to the workplace retirement plans they need to prepare for financial security in retirement. Employees of organizations that participate in a MEP 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.

MEPs offer numerous benefits for small employers and their workers:

- (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;
- (6) present enhanced opportunities for cost-effective participant education programs through pooling of resources with other employers; and
- (7) enable small employers to more effectively compete for employees with larger companies that can more easily assume the costs and responsibilities associated with sponsoring retirement plans.

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."<sup>4</sup> This commonality requirement has proven to be a

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<sup>4</sup> 83 FR 53537.

substantial barrier for small employers who 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.<sup>5</sup>

We do not believe this change would undermine or destabilize existing MEP arrangements under current rules. Rather, we believe entities that already sponsor MEPs under current rules would be well-positioned to expand their established programs to far more small employers with far less time and expense than new entrants to this space.

IRI has long supported federal legislation that would remove this significant barrier to broader utilization of multiple employer plans, such as the *Setting Every Community Up for Retirement Enhancement Act of 2019* (the “SECURE Act”), and we would strongly encourage the Department to undertake rulemaking to achieve this goal.

### **The Department Should Expressly Permit Financial Institutions to Sponsor Open MEPs.**

A robust and competitive Open MEP marketplace must be permitted to develop to effectively expand plan coverage. Financial services companies such as banks, insurance companies and broker-dealer and asset management firms can 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.

Allowing a financial services firm to sponsor an Open 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, broker-dealers, and asset managers are permitted to sponsor MEPs, they could leverage those existing relationships to improve financial literacy and encourage more Americans to save for retirement.

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<sup>5</sup> Utilization of MEPs has also been adversely impacted by the “unified plan rule,” which exposes employers who participate in MEPs and their employees to potential negative consequences caused by the acts or omissions of other participating employers. The Department of the Treasury and the Internal Revenue Service have proposed amendments to the “unified plan rule” to remove this barrier to broader utilization of MEPs. IRI and our members generally support the intent of that proposal, though we also endorse and support the recommended modifications submitted by the American Council of Life Insurers.

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.

For these reasons, we do not believe extensive conditions or limitations should be imposed on the types of Commercial Entities (as defined in the RFI) that should be permitted to sponsor an Open MEP. By allowing and encouraging the development of a competitive marketplace, the Department would effectively prevent unqualified entities from entering the Open MEP space. At most, the Department could consider requiring that market entrants be subject to some form of prudential regulation (e.g., by state insurance departments, the Securities and Exchange Commission (SEC), the Financial Industry Regulatory Authority (FINRA), or the Office of the Comptroller of the Currency (OCC), including financial institutions that are pension recordkeepers or TPAs and have a parent, subsidiaries or affiliates that are subject to those prudential regulatory bodies) to prevent wholly unregulated entities from sponsoring an Open MEP. In our view, any more stringent conditions or limitations would be the equivalent of the Department picking winners and losers.

We do, however, recognize that appropriate safeguards will be needed to ensure that financial institutions effectively manage the conflicts of interest that could arise if, for example, the institution sponsoring the Open MEP also offers to sell its own proprietary products or services to participating employers or their workers. A prohibited transaction exemption subject to reasonable conditions would be needed under such circumstances. (e.g., requiring that an independent plan fiduciary be involved to oversee any proprietary offerings).

### **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.

Thank you again for the opportunity to provide these comments. If you have questions about our views on the questions posed in the RFI, or if we can be of any further assistance in connection with this important regulatory effort, please feel free to contact the undersigned at [jberkowitz@irionline.org](mailto:jberkowitz@irionline.org) or 202-469-3014.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jason Berkowitz', is written over the typed name and title.

Jason Berkowitz  
Chief Legal & Regulatory Affairs Officer