

**DEPARTMENT OF LABOR****Employee Benefits Security Administration****29 CFR Parts 2510**

RIN 1210-AB92

**“Open MEPs” and Other Issues Under Section 3(5) of the Employee Retirement Income Security Act**

**AGENCY:** Employee Benefits Security Administration, U.S. Department of Labor.

**ACTION:** Request for information.

**SUMMARY:** This document is a request for information regarding the definition of “employer” in section 3(5) of the Employee Retirement Income Security Act of 1974, as amended (ERISA). The document mainly seeks comments on whether to amend our 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. The term “open MEP” in this document refers to a single defined contribution retirement plan that covers employees of multiple unrelated employers. The information received in response to the questions in this document may form the basis of future rulemaking under ERISA. This request for information was triggered in part by public comments received on a related rulemaking action under section 3(5) of ERISA, with respect to which a final rule is being published elsewhere in this issue of this **Federal Register**. This document also solicits information on other issues raised by these commenters, but which were considered beyond the scope of that final rule.

**DATES:** Comments should be submitted to the Department on or before October 29, 2019.

**ADDRESSES:** You may submit written comments, identified by 1210-AB92, to either of the following addresses:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail:* 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: 1210-AB92 “Open MEPs” and Other Issues Under Section 3(5) of ERISA.

*Instructions:* All submissions received must include the agency name and Regulatory Identifier Number (RIN) for this rulemaking. Persons submitting

comments electronically are encouraged not to submit paper copies. Comments will be available to the public, without charge, online at <http://www.regulations.gov> and <http://www.dol.gov/agencies/ebsa>, and at the Public Disclosure Room, Employee Benefits Security Administration, Suite N-1513, 200 Constitution Avenue NW, Washington, DC 20210.

**Warning:** Do not include any personally identifiable or confidential business information that you do not want publicly disclosed. Comments are public records posted on the internet as received and can be retrieved by most internet search engines.

**FOR FURTHER INFORMATION CONTACT:**

Colleen Brisport, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693-8500. This is not a toll-free number.

**SUPPLEMENTARY INFORMATION:****I. Background***A. In General*

The Department of Labor (Department) published a final rule (MEP Final Rule) in this issue that expands access to affordable quality retirement savings options by clarifying the circumstances under which an employer group or association or a professional employer organization (PEO) may sponsor a single workplace defined contribution retirement plan under title I of ERISA (as opposed to providing an arrangement that constitutes multiple retirement plans). The final regulation does this by clarifying that employer groups or associations and PEOs can, when satisfying certain criteria, constitute “employers” within the meaning of section 3(5) of ERISA. As an “employer,” the group or association, or PEO, can sponsor a single defined-contribution “employee pension benefit plan” within the meaning of section 3(2) of ERISA, for its members or client employers (such plans, whether characterized as “Association Retirement Plans” or not, are collectively referred to hereinafter as Multiple Employer Plans, “MEPs,” unless otherwise specified).

The MEP Final Rule responds to Executive Order 13847, “Strengthening Retirement Security in America” issued on August 31, 2018 (Executive Order), which directed the Secretary of Labor to examine policies that would: (1) 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; and (2) increase retirement

security for part-time workers, sole proprietors, working owners, and other entrepreneurial workers with non-traditional employer-employee relationships by expanding their access to workplace retirement plans, including MEPs.

*B. The Statute*

ERISA applies not to every employee benefit plan, but, as relevant here, to an “employee benefit plan” sponsored by an “employer.” ERISA § 4(a)(1); 29 U.S.C. 1003(a)(1).<sup>1</sup> Section 3(5) of ERISA, in turn, defines the term “employer.” In relevant part it states that the term “employer” means “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.” 29 U.S.C. 1002(5).

*C. Bona Fide Groups or Associations of Employers*

Under the MEP Final Rule, a bona fide group or association of employers is considered an “employer” and may sponsor a MEP for its members if certain conditions are satisfied. Four of these criteria are that the group or association must have a formal organizational structure, be controlled by its employer members, have at least one substantial business purpose unrelated to offering and providing employee benefits to its members, and limit plan participation to employees and former employees of employer members. In addition, employer members must have a commonality of interest, each employer must directly act as an employer of at least one employee participating in the MEP, and the group or association must not be a financial services firm. The commonality criteria is satisfied if the employer members have common geography or industry—*i.e.*, they are in the same trade, industry, line of business or profession; or each employer has a principal place of business in the same region that does not exceed the boundaries of a single State or metropolitan area (even if the metropolitan area includes more than one State).

*D. Bona Fide Professional Employer Organizations*

Under the MEP Final Rule, a bona fide PEO is considered an “employer” and may sponsor a MEP for its client employers if four conditions are

<sup>1</sup> ERISA also covers benefit plans established or maintained by employee organizations and such plans established or maintained by both employers and employee organizations.

satisfied.<sup>2</sup> The PEO must perform substantial employment functions on behalf of its client employers. The PEO must have substantial control over the functions of the MEP, as the plan sponsor, administrator, and a named fiduciary. The PEO must ensure that each client employer has at least one employee covered under the MEP. The PEO also must ensure that participation in the MEP is available only to employees and former employees.

#### *E. Need for This Request for Information*

The MEP Final Rule was preceded by a notice of proposed rulemaking (Proposed Rule) on the same topic.<sup>3</sup> The Proposed Rule solicited comments on, *inter alia*, so-called “open MEPs” or “pooled employer plans,” which generally are arrangements that cover employees of employers with no relationship other than their joint participation in the MEP. The Proposed Rule specifically requested comments on whether, and under what circumstances, these arrangements should and could be operated as ERISA-covered plans. The solicitation asked commenters who believe that these arrangements should be addressed by rulemaking to include a discussion of why such an arrangement should be treated as one employee benefit plan within the meaning of title I of ERISA rather than as a collection of separate employer plans being serviced by a commercial enterprise that provides retirement plan products and services. Such commenters also were encouraged to provide suggestions regarding the regulatory conditions that should apply to these particular arrangements.

The Department received approximately sixty (60) comments in response to the Proposed Rule. More than half of the comments received addressed this issue, and the majority were supportive of the Department promulgating a rule that would facilitate these arrangements.<sup>4</sup> Supporting commenters argued that open MEPs would best promote the objectives of Executive Order 13847 and that open MEPs are not precluded by ERISA. They

argued that the text of ERISA demonstrates that open MEPs may be sponsored by “any person acting . . . indirectly in the interest of an employer, in relation to an employee benefit plan.” They asserted that the Proposed Rule contained an unnecessarily narrow interpretation of “employer” under section 3(5) of ERISA. They speculated that the narrow view in the Proposed Rule was likely influenced by the Department’s experience with abusive Multiple Employer Welfare Arrangement (MEWA) schemes in the past, but they aver that defined contribution MEPs are structurally different arrangements with fundamentally different regulatory ecosystems than MEWAs.

But even among the supporters of open MEPs, there were very different ideas on how the Proposed Rule might best be amended to facilitate open MEPs. Some commenters, for example, recommended eliminating some or all of the substantial business purpose, control, and commonality requirements from the Proposed Rule’s *bona fide* group or association provisions, and the provision that prohibits financial services firms from being the group or association that establishes the MEP. Other commenters, however, recommended modifications to, and an expansion of, the Proposed Rule’s *bona fide* PEO provisions. These commenters argued that the *bona fide* PEO framework, with appropriate modifications, could readily be expanded beyond the narrow scope of PEOs to include commercial enterprises more generally. To these commenters, a commercial entity’s willingness to exert substantial control over the functions and activities of the MEP, as the plan sponsor, plan administrator, and as a named fiduciary provides a sufficient basis to conclude that such an entity is acting “indirectly in the interest of an employer . . . in relation to an employee benefit plan” for purposes of section 3(5) of ERISA, without regard to whether the entity is a PEO.

Not all commenters, however, supported the idea of open MEPs. Some commenters supported the prohibition against commercial entities and financial services firms being able to sponsor MEPs as an “employer” under section 3(5) of ERISA. Among other things, these commenters raised issues regarding statutory authority and potential conflicts of interests among those businesses, entities, and other commercial ventures that most likely would be interested and willing to sponsor open MEPs. A few commenters viewed the topic of open MEPs as perhaps being better suited for

legislation, given the wide range of issues presented under ERISA and the Internal Revenue Code (Code).

After reviewing the comments, the Department is persuaded that open MEPs deserve further consideration. The Department does not believe that it has acquired a sufficient public record on, or a thorough understanding of, the complete range of issues presented by the topic. In light of this and the conflict in the comments about whether and how to permit open MEPs, as well as legislation pending in the 116th Congress, the Department has decided to stimulate further debate and to further develop the public record by soliciting comments on a broad range of issues relating to open MEPs, as set forth in Section II of this document.

#### *F. Regulatory Authority*

The Department has broad authority to craft regulations under section 505 of ERISA. This section provides, in relevant part, that “the Secretary may prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this subchapter.” This authority extends to situations where, as here, the text of ERISA section 3(5) is ambiguous on its face.<sup>5</sup>

## **II. Request for Information**

This document contains a number of questions. Respondents need not answer every question, but should identify, by number, each question addressed. Interested persons also are encouraged to address any other matters they believe are germane to the general topic of the request for information.<sup>6</sup>

### *A. “Open MEPs”*

1. Should the Department amend 29 CFR 2510.3–55 to expressly permit financial institutions or other persons to maintain a single defined contribution retirement plan on behalf of multiple unrelated employers (hereinafter “open MEP”)? Many commenters on the Proposed Rule argued in support of open MEPs. Do you agree with the commenters? If the answer is yes or no, why?

2. What type of person or persons should be recognized as capable of being an “employer” under the “indirectly in the interest” clause in section 3(5) of ERISA for purposes of establishing and maintaining an open MEP? For example, many commenters suggested that banks, insurance companies, broker-dealers, and other

<sup>2</sup> A PEO generally refers to an organization that enters into an agreement with a client to perform some or all of the federal employment tax withholding, reporting, and payment functions related to workers performing services for the client. The provisions of a PEO arrangement typically state that the PEO assumes certain employment responsibilities that the client-employer would otherwise fulfill with respect to employees.

<sup>3</sup> 83 FR 53534 (October 23, 2018).

<sup>4</sup> Comments on the Proposed Rule are available here: <https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB88>.

<sup>5</sup> See 83 FR 28912, 14 (June 21, 2018); 83 FR 53534, 37 (Oct. 23, 2018) (citing case law that observed the ambiguity).

<sup>6</sup> Comments will be shared with the Department of the Treasury.

similar financial services firms (including pension recordkeepers and third-party administrators) (hereinafter “Commercial Entities”) should be recognized for this purpose. Are these commenters correct, and why? What, if any, are appropriate limitations on the types of Commercial Entities that should be recognized as employers?

3. If a Commercial Entity could sponsor an open MEP, what conflicts of interest, if any, would the Commercial Entity, affiliates, and related parties likely have with respect to the plan and its participants? To what extent could a Commercial Entity that sponsors the open MEP affect its own compensation or the compensation of affiliates or related parties through its actions as a sponsor, fiduciary, or service provider to the plan? What categories of fees and compensation, direct or indirect, would Commercial Entities, affiliates, and related parties likely receive as a result of sponsoring the MEP, rendering services to the MEP, or offering investments (including proprietary products) to the MEP? How could these or other such conflicts of interest be appropriately mitigated? How effective would the suggested conflict-mitigation approaches likely be in safeguarding MEPs from conduct that favors the interests of the Commercial Entity, affiliates, or related parties at the plan’s expense? Would prohibited transaction exemptions be necessary to avoid violations of Section 406 of ERISA and imposition of excise taxes under Section 4975(c) of the Internal Revenue Code? Are different mitigating provisions appropriate for different Commercial Entities, and why or why not?

4. The current regulation contains provisions that limit the breadth of ERISA section 3(5)’s “indirectly in the interest” clause as applied to the two types of multiple employer plans covered by that regulation. For instance, in the case of a bona fide group or association, the regulation contains the commonality and control requirements. As another example, in the case of a bona fide PEO, the regulation contains the substantial employment functions and control requirements. Are limiting principles or conditions needed in the case of open MEPs? Please explain why or why not. If such principles or conditions are necessary or helpful, please provide examples of principles or conditions that would be appropriate limitations along with reasons for such limitations.

5. Commenters offered two distinctly different approaches on how the current regulation could be reformulated to facilitate open MEPs. For example, some commenters recommended amending

the bona fide group or association provisions by deleting the commonality and control requirements, and the prohibition on Commercial Entities. Other commenters, by contrast, recommended modifying the bona fide PEO provisions to cover Commercial Entities, but with additional or different criteria to reflect the differences between PEOs and these other entities. What are the benefits and drawbacks of each of these approaches, and are there other approaches or alternatives the Department should consider?

6. If the Department took either approach described in the prior question, what would the impact be on MEPs offered by existing groups or associations of employers or by existing PEOs? Is there a risk that open MEPs, under either approach, would undermine or destabilize these existing arrangements? For example, would nationwide open MEPs undermine or destabilize geography-based MEPs sponsored by groups or associations? If so, what steps could the Department take to mitigate such impacts? For instance, commenters on the Proposed Rule suggested that bona fide group or association MEPs should be permitted to cover regions larger than the boundaries of a single State or metropolitan area that includes more than one State. Are these commenters correct? Why or why not?

7. Some commenters raised concerns about the potential cost and complexity arising from the application of the various qualification requirements under section 401(a) of the Code (e.g., nondiscrimination, exclusive benefit, minimum participation, minimum coverage, and top-heavy requirements) to the potentially large numbers of employers that theoretically could participate in a nationwide open MEP. These commenters are concerned that the cost and complexity of these requirements in this context may offset some of the savings otherwise associated with establishing and maintaining an open MEP. Are these commenters correct? If so, do the potential costs and complexities outweigh the benefits of offering open MEPs?

8. Would a regulation facilitating the adoption and marketing of open MEPs by Commercial Entities have an impact on the implementation, administration, or enforcement of any State or federal laws, apart from ERISA and the Internal Revenue Code, particularly including securities, insurance, and banking laws? Are there any specific issues relating to such other laws, which the Department should consider in connection with any rulemaking effort?

### B. Corporate MEPs

The Proposed Rule solicited comments on whether the MEP Final Rule should address the status of so-called “corporate MEPs,” a term not defined in ERISA. For that purpose, the Proposed Rule considered “corporate MEPs” to be defined contribution plans that cover employees of employers related by some level of common ownership, but that are not in the same controlled group or affiliated service group within the meaning of section 414(b), (c), or (m) of the Code.

In response, one commenter provided an example of what it described as a common fact pattern that should be addressed by rulemaking or other guidance. The example involves two companies, A and B, in different industries and different parts of the country, where, as a result of an acquisition, A now owns 60% of B but the remaining 40% of B is owned by unrelated parties. If A and B jointly maintain a retirement plan for the benefit of their employees, it does not appear that A and B would meet the commonality of interest conditions to qualify as a MEP and, consequently, this “corporate MEP” would not be a single plan under the Proposed Rule, but instead would be two plans for purposes of ERISA.

The Department recognizes that meaningful levels of common ownership may serve as an indicator that the members of the ownership group have among themselves a sufficient relationship, unrelated to the provision of benefits. This relationship may be enough such that one or more of these members can be said to be acting “indirectly in the interest of” the others within the meaning of ERISA section 3(5) to sponsor a MEP for the group’s participation. In DOL Advisory Opinion 89–06A, for example, the Department opined that a member of a controlled group of corporations that establishes a benefit plan for its employees and the employees of other members of the controlled group is considered to be an employer within the meaning of ERISA section 3(5), such that only one plan exists for all members of the group.<sup>7</sup>

On the existing public record, however, the Department lacks a meaningful basis on which to determine the precise level of ownership, below the controlled group of corporations

<sup>7</sup> With respect to a plan maintained by one or more members of a controlled group of corporations (within the meaning of section 1563(a) of the Code, determined without regard to sections 1563(a)(4) and (e)(3)(C)), all employees of such corporations shall be treated as employed by a single employer. 29 USC 1060(c).

threshold established in section 414(b) of the Code (or the corresponding threshold for a controlling interest in a trade or business in section 414(c) of the Code), that conclusively distinguishes bona fide ownership groups from commercial enterprises in which members have nominal ownership levels and which exist primarily or solely to market, distribute, underwrite or otherwise provide employee benefits to the nominal owners.

9. Should the Department amend 29 CFR 2510.3–55 to address “corporate MEPs,” and if so, why and how? Apart from the definition of a controlled group of corporations within the meaning of section 414(b) of the Code, (or a group of trades or businesses under common control within the meaning of section 414(c) of the Code), is there a precise level of common ownership that could and should be used to deem two or more corporations, trades, or businesses to have sufficient ownership ties such that any one of these corporations, trades, or businesses can be said to be able to act “indirectly in the interest of” the others within the meaning of ERISA section 3(5) to sponsor a MEP for the group’s participation? Are there aspects of control or commonality that the Department should consider in addition to the precise level of common ownership? Put another way, if the Department were to consider facts and circumstances, either in addition to, or in lieu of, level of common ownership, what facts and circumstances would be appropriate to consider? Also, what sufficient ties are needed for two or more tax-exempt organizations or a tax-exempt organization and another organization to be treated as an employer within the meaning of section 3(5) of ERISA?

10. Should members of an “affiliated service group” within the meaning of section 414(m) of the Code be treated as an employer within the meaning of section 3(5) of ERISA? If so, why?

### *C. Economic Analysis, Paperwork Reduction Act, and Regulatory Flexibility Act Questions*

Executive Order 12866 (E.O. 12866) requires an assessment of the anticipated costs and benefits to the government and the public of a significant rulemaking action, and of the alternatives considered, using the

guidance provided by the Office of Management and Budget. Under E.O. 12866, a determination must be made whether implementation of this rule will be economically significant. A rule that has an annual effect on the economy of \$100 million or more is considered economically significant.

In addition, the Regulatory Flexibility Act may require the preparation of an analysis of the impact on small entities of proposed rules and regulatory alternatives. A regulatory flexibility analysis must generally include, among other things, an estimate of the number of small entities subject to the regulations (for this purpose, plans, employers, and issuers and, in some contexts small governmental entities), the expense of the reporting, recordkeeping, and other compliance requirements (including the expense of using professional expertise), and a description of any significant regulatory alternatives considered that would accomplish the stated objectives of the statute and minimize the impact on small entities. For this purpose, the Agency considers a small entity to be an employee benefit plan with fewer than 100 participants.

The Paperwork Reduction Act requires an estimate of how many “respondents” will be required to comply with any “collection of information” requirements contained in regulations and how much time and cost will be incurred by the respondents as a result. A collection of information includes recordkeeping, reporting to governmental agencies, and third-party disclosures.

The Department is requesting comments that may contribute to the analyses that will be performed under these requirements, both generally and with respect to the following specific areas:

11. What costs and benefits would be associated with allowing an open MEP consisting of employers with no relationship other than their joint participation in the MEP to be operated as a single ERISA-covered plan? How would the costs and benefits of open MEPs compare to those associated with MEPs sponsored by bona fide groups and associations and (PEOs)? Please explain.

12. What types of entities would have business motives to sponsor open

MEPs? For each type, how prevalent would their sponsorship likely be? What would be the economic advantages and disadvantages of each type of entity for employers and participants and beneficiaries? Please explain.

13. What types of employers would join open MEPs? What size would they be (*i.e.*, would large employers, mid-size employers, or small employers be particularly interested in joining an open MEP)? How many would join open MEPs to begin offering retirement benefits to workers who previously did not have access to them? How many employers would be switching away from another type of retirement savings vehicle or plan? What type? Please explain.

14. Please describe how prevalent automatic enrollment would likely be among employers that join open MEPs.

15. Please describe how common it will likely be for employers participating in open MEPs to accept rollovers from other qualified plans.

16. Please indicate how many self-employed people are likely to join open MEPs.

17. Please compare the overall cost of providing defined contribution retirement benefits among the following types of retirement plans:

- Open MEPs.
- MEPs sponsored by bona fide groups and associations.
- MEPs sponsored by PEOs.
- Single-employer plans sponsored by small businesses.

Additionally, please compare what the likely total plan fees will be for a.–d. Please compare the likely costs and fees for various component services, such as asset management, recordkeeping, and marketing and distribution, across a–d.

18. What costs and benefits would be associated with allowing corporate MEPs described in Section B., above, to operate as single ERISA-covered defined contribution plans?

Signed at Washington, DC, on July 22, 2019.

**Preston Rutledge,**

*Assistant Secretary, Employee Benefits Security Administration, Department of Labor.*

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