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Definition of "Employer" under Employee Retirement Income Security Act-Association Retirement Plans and Other Multiple-Employer Plans

Comment On: EBSA-2018-0007-0060

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

Document: EBSA-2018-0007-0068

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Submitter Information

Name: Robb Smith

General Comment

The Honorable Preston Rutledge
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC

RE: Comments in Response to Department of Labor Request for Information titled Open MEPs and Other Issues Under Section 3(5) of the Employee Retirement Income Security Act,"

Dear Assistant Secretary Rutledge,

RS Fiduciary Solutions respectfully submits comments in regard to Open MEPs rule making. RS Fiduciary Solutions is an independent ERISA fiduciary consulting firm that works closely with plan sponsors and plan advisors to ensure qualified retirement plans are operated and managed at the highest level of prudence and solely for the benefit of plan participants and their

beneficiaries.

The beauty of the O-MEP concept is that an established, incredibly successful model exists (i.e. closed-MEPs) that provides predictive outcomes and eliminates much of the learning curve encountered with most new legislation or regulation.

However, in promulgating a final ruling, the Department should be ever mindful of the following factors:

Elimination of any prohibited transactions

Elimination of self-dealing by owners/sponsors and service providers

Minimization or elimination of conflicts of interest (both real and perceived)

(This is particularly true when determining who can and cannot act as owners/sponsors of an O-MEP)

Comments in Response to RFI

II. Request for Information

A. Open MEPs Q&A

Q. #1. RSFS firmly believes that the Department should amend 29 CFR 2510.3-55 and promulgate regulations in full support of open MEPs (O-MEPs).

Q. #2. In general, we would allow financial institutions the ability to own and participate in aspects of O-MEPs only if:

No person could own more than 49% of the O-MEP,

O-MEP is formed as separate corporate entity,

Board membership would include, at a minimum: the owners, at least two outside directors and, in most instances, the trustees of the O-MEP,

Owners may be permitted to act in only one service provider capacity in which they would receive compensation for their services.

Q. #3. The O-MEP would be governed by no less than three unrelated trustees:

Named in plans legal docs

Each trustee will have industry & practical experience

Q. #4. The easing of certain current regulatory restrictions seems justified including easing of issues of commonality, control and the one bad apple.

Q. #5. No comment

Q. #6. No comment

Q. #7. Opponents often cite cost as a potentially limiting issue when discussing O-MEPs. However, the discussion of costs is normally conducted in a vacuum. When properly designed, an O-MEP provides significantly greater protections to plan participants and, as such, should potentially command higher over-all fees.

Q. #8. No comment

Q. #9. No comment

Q #10. No comment

Q. #11. No additional comments.

Q. #12. Those entities most apt to own/sponsor an O-MEP will be financial services related organizations, specifically, investment firms, plan recordkeepers, TPAs, banks and insurance companies. Others that will join the fray will include attorneys, CPA firms, TAMPs and ancillary plan service providers.

Q. #13. Our opinion is that a wide variety of unrelated industry groups will be interested in joining an O-MEP. The greatest initial impact will be on the small plans market. Also, mid-size employers will consider O-MEPs as a way to reduce fiduciary exposure and costly internal administrative responsibilities.

Q. #14. O-MEP plans should provide joining employers the option of choosing both auto-enroll and auto-increases for their employee/participants.

Q. #15. A roll-over option should be standard on any O-MEP platform.

Q. #16. Our belief is O-MEPs will have little impact on the self-employed.

Q. #17 While initially O-MEPs may not benefit from economies of scale enjoyed by existing closed-MEPs or single employer plans, we believe such economies will quickly evolve as O-MEPs grow in popularity.

Q. #18. No comment

Summary of Comments

Potentially thousands of joining employers and millions of employee/participants are currently precluded from benefiting from MEPs. We have laid out a framework that we believe best addresses solutions to the most problematic areas of O-MEPs: prohibitive transactions, self-dealing and conflicts of interest. These are particularly problematic when addressing issues of O-MEP ownership, sponsorship, authority and compensation. The Department must ensure a level O-MEP playing field so the largest industry service providers do not take undue advantage of the opportunities presented to undermine others that may be just as qualified but lack size and resources of their larger counterparts.

We would like to thank the Department for allowing us to share our thoughts on open-MEPs.

Sincerely,

Robb R. Smith
Managing Director
RS Fiduciary Solutions