December 20, 2018

Submitted via www.regulations.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: Definition of Employer under Section 3(5) of ERISA – Association Retirement Plans and Other Multiple Employer Plans, RIN 1210–AB88

Dear Sir/Madam:

The American Benefits Council ("Council") appreciates the opportunity to submit comments on the Department of Labor's ("Department") proposed regulation regarding association retirement plans and other multiple employer plans ("MEPs").[1]

The Council strongly supports legislative and regulatory action to expand access to workplace retirement plans by reducing the administrative burdens and costs of sponsoring such plans. The Department's proposal would take a step in this direction by expanding the situations in which an employer group or association may sponsor a MEP that is treated as a single plan for purposes of the Employee Retirement Income Security Act of 1974 ("ERISA"). However, as described below, the majority of the conditions that the proposed regulation would impose on such "bona fide" groups or associations do not have a basis in the statutory language of ERISA, which means that ***the Department has authority to greatly expand the use of MEPs by employer groups and associations beyond what is set forth in the proposal***.

In fact, as discussed below, some of the conditions imposed on such groups or associations are so unrelated to the statute that in other analogous regulatory contexts, such conditions have been invalidated as unreasonable. Thus, the Department can (1) ensure the validity of its regulation, (2) expand coverage, and (3) as discussed below,

[1] 83 Fed. Reg. 53,534 (Oct. 23, 2018).

better serve the President's Executive Order, by removing the problematic conditions, as described in this letter.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans that cover more than 100 million Americans.

STATUTORY SUPPORT FOR AND SUMMARY OF COMMENTS

Background: In the preamble to the proposed regulation, the Department discusses at length the importance of ensuring that its regulations focus only on employment-based arrangements that are subject to ERISA.[2] ERISA generally applies to any employee benefit plan if it is established or maintained by an "employer."[3] Section 3(5) of ERISA defines "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 (emphasis added).

As noted by the Department, the definition of employer in section 3(5) uses a number of terms that are not further defined or explained by the statute. The absence of a statutory definition of "group or association of employers" has led the Department over the years to address this ambiguity in subregulatory guidance with respect to the ability of employer groups and associations to offer a MEP. As described in the preamble, the Department has taken a narrow view in that subregulatory guidance, requiring that a number of restrictive conditions be met that go well beyond simply ensuring that an employment-based arrangement is present.

Inconsistent with President's Executive Order: President Trump's executive order on "Strengthening Retirement Security in America" ("Executive Order")[4] directed the Department to consider issuing guidance clarifying when employer groups or associations could be an employer within the meaning of section 3(5) of ERISA "to the extent consistent with applicable law." Because a number of the proposal's conditions on "bona fide" groups or associations neither have a basis in ERISA nor are necessary for determining the presence of an employment-based arrangement, the Department's proposed regulation falls short of meeting the task as set forth by the President in the Executive Order.

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[2] *See, e.g., id.* at 53,537.

[3] ERISA § 4(a)(1).

[4] Executive Order 13847 (Aug. 31, 2018).

No basis in ERISA for conditions applied: In the context of a single employer plan, a plan is generally subject to ERISA as long as the plan is being provided by an employer for the benefit of its employees. The same principle should apply with respect to MEPs – as long as the MEP is being provided by a "group or association" of employers for the benefit of such employers' employees, there is no statutory basis for requiring additional arbitrary conditions such as the nexus or commonality of interest requirements in the proposal.

Where in the statute, for example, is there an indication that limits based on geography or line of business are appropriate in determining what constitutes a group or association of employers, as would be required by the proposal? The conditions in the proposal are inconsistent with the statute and do not serve a role in distinguishing employer plans from those offered by commercial providers outside of an employment context, notwithstanding the Department's preamble discussion on this point.[5]

Geographic limitation invalidated in analogous context: In a very analogous area, the U.S. Court of Appeals for the Seventh Circuit found that a geographic limitation, like the one in the proposed regulation, was "unreasonable" and was therefore "invalid."[6] In the Seventh Circuit case, the issue was whether a trust maintained on behalf of the employees of multiple employers qualified as a voluntary employees' beneficiary association ("VEBA") under section 501(c)(9) of the Internal Revenue Code. Under Treasury's VEBA regulations, the membership of a VEBA:

> must consist of individuals who become eligible to participate by reason of their being employees and whose eligibility for membership is defined by reference to objective standards that constitute an employment-related common bond among such individuals . . . *[E]mployees of one more employers engaged in the same line of business* ***in the same geographic locale*** *will be considered to share an employment-related bond.*[7] (emphasis added)

The issue in this case, as in the proposed regulation, is that "some employment-related bond is necessary to distinguish true VEBAs from entrepreneurial commercial"[8] enterprises. The court rejected the geographic locale requirement in strong terms:

> geography alone has no reasonable or logical relation to the establishment of an "employment-related bond" . . . We . . . conclude that the Secretary's distinction

[5] 83 Fed. Reg. 53,537-38.

[6] *Water Quality Association Employees' Benefit Corporation v. United States*, 795 F. 2d 1303, 1313 (7th Cir. 1986).

[7] Treas. Reg. §1.501(c)(9)-2(a)(1).

[8] *Water Quality*, at 1309.

> among VEBAs based on geography is unreasonable . . . . Accordingly, [the VEBA regulation] is invalid to the extent that it requires associations whose membership consists of employees of one or more employers engaged in the same line of business to meet the added "same geographic locale restriction"… [9]

There are a few points to emphasize about this case. First, it is a very similar issue to the MEP issue: when is there a sufficient bond among employers to constitute a bona fide group? Geographic locale is irrelevant in that inquiry and any geographic restriction would be invalid. Second, the case does not hold that the line of business requirement is valid; that issue simply was not raised based on the facts of the case. Third, although the IRS has not acquiesced in the case, the holding of the Seventh Circuit has not been challenged by the IRS in the ensuing 32 years in any other Circuit, a rather telling sign of the strength of the holding in the case.

Absence of any policy justification: In the absence of any statutory basis for the conditions included in the proposed regulation, it would be logical to consider any policy issues that may have guided the Department's use of its regulatory authority. In this regard, the Department acknowledges in the preamble that it is unaware of any evidence that defined contribution MEPs present a greater risk of fraud or abuse than single employer defined contribution plans.[10] As such, the Department has identified no policy reasons to continue applying restrictive conditions when determining whether a MEP will be treated as a single plan, especially when such conditions are not required under ERISA.

In fact, the only justification for continuing to apply the restrictions to groups and associations of employers in the MEP context appears to be that the conditions would be nearly identical to those imposed under the Department's recently finalized rules on association health plans ("AHPs"). The Department's argument may very well be that, because the same statutory definition of "employer" in section 3(5) of ERISA applies in both the retirement and health context, the regulatory definitions should not differ. And, having the same structure promotes "simplicity and uniformity."[11]

Department explicitly rejects the notion that the definition of "employer" must or should be consistent: An argument that the MEP regulations must or should follow the AHP regulations is inconsistent with the Department's own preamble. The Department explicitly states that policy reasons provide the Department with administrative flexibility to justify treating defined contribution and defined benefit MEPs differently:

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[9] *Id.* at 1311, 1313.

[10] *Id.* at 53,544.

[11] *Id.* at 53,538.

> The Department's proposal also would not involve defined benefit plans, in part, because the Department's view is that such plans raise different policy considerations.[12]

Given this acknowledged administrative flexibility, why should defined contribution MEPs be required to adhere to rules designed for AHPs? The potential to broaden retirement plan coverage through the greater use of MEPs should not be constrained due to the imposition of restrictions that were designed to address the very different policy concerns that exist in the health insurance context, including policy concerns that vary based on considerations such as whether health insurance is offered in the small group or large group context.

Summary of recommendations: For the reasons discussed above, we have the following comments on the proposed regulation, which are described in more detail below:

1. The following conditions required of a "bona fide" group or association of employers should be eliminated because they have no basis in ERISA and serve no policy purpose with respect to MEPs:

    - the requirement that the group or association have at least one substantial business purpose unrelated to providing the MEP or other employee benefits;
    - the requirement that employer members of the group or association have a commonality of interest;
    - the requirement that the employer members control the functions and activities of the group or association; and
    - the requirement that the group or association generally not be a bank, trust company, insurance issuer, broker-dealer, or other financial services firm.

2. The only conditions that should apply to determining whether a group or association of employers is "bona fide" for purposes of sponsoring a MEP are those that help ensure that the MEP is provided through an employer-employee relationship:

    - the requirement that each employer member participating in the plan acts directly as an employer of at least one employee who participates in the MEP;

[12] *Id.* at 53,536.

- the requirement that the group or association has a formal organizational structure; and
- the requirement that plan participation is only made available to employees and former employees (and their beneficiaries) of the employer members.

3. The proposal should be extended to apply to defined benefit MEPs in addition to defined contribution MEPs. The Department has offered no policy reasons to justify omitting defined benefit MEPs from the proposal. Applying the same regulatory structure to both types for purposes of MEPs further promotes the Department's "[c]oncerns for simplicity and uniformity."[13]

4. With respect to the Department's specific comment requests and other particular aspects of the proposal, the Council has the following additional comments:

    - The text of the final regulation should explicitly state that a MEP is treated as a single plan for purposes of ERISA when the conditions of the regulation are met.
    - The robust notice and reporting requirements that already apply to defined contribution plans are sufficiently protective of participants in MEPs, and no additional notice or reporting requirement should be required.
    - The text of the final regulation should provide that nothing in the regulation is intended to affect an employer's status as a joint employer or the determination of whether a worker is an employee or independent contractor with respect to an employer.

1. REQUIREMENTS OF A "BONA FIDE" GROUP OR ASSOCIATION OF EMPLOYERS THAT HAVE NO BASIS IN ERISA AND SHOULD BE ELIMINATED OR SUBSTANTIALLY BROADENED

As discussed above, a number of the conditions that the proposed regulation would require of a "bona fide" group or association of employers in order for such group or association to be considered an employer for purposes of sponsoring a MEP are unnecessarily restrictive and should be eliminated because they are arbitrary and have no basis in ERISA's statutory language.

- **Substantial business purpose requirement:** Section 2510.3-55(b)(1)(i) of the proposal would require "bona fide" employer groups or associations to have "at least one substantial business purpose unrelated to offering and providing MEP coverage or other employee benefits to its employer members and their employees." There is no basis for reading into ERISA's text a requirement that

[13] *Id.* at 52,538.

a group or association of employers remain a viable entity even if its principal (or sole) reason for being (i.e., the offering of employee benefits) is removed. This requirement will simply result in the unnecessary creation of work or a "purpose" for the group or association (when not already present) beyond the offering of employee retirement or health benefits. This, in turn, will only increase costs to the employer members and discourage the greater use of MEPs.

- **Commonality of interest requirement:** Section 2510.3-55(b)(1)(v) of the proposal would require that the employer members of a "bona fide" group or association have a commonality of interest such that the members (1) are in the same trade, industry, line of business, or profession, or (2) have a principal place of business in the same region that does not exceed the boundaries of a single state or metropolitan area. This requirement also has no basis in ERISA, and accordingly the Department should eliminate it. Requiring a commonality of interest only serves to limit the potential economies of scale that MEPs could achieve.

  Restricting "bona fide" groups or associations based on geographical location such as the proposal would do is an artificial and arbitrary construct (as well as legally unsound as discussed above). For example, a group or association of employers spanning the entire state of California would be, for all policy and legal purposes, no different than simply establishing a nationwide standard. There are no policy or legal justifications for the geographical or line of business limits in the proposal, and we urge the Department to make employer groups and associations eligible for "bona fide" status on a nationwide basis, regardless of whether the employer members are in the same trade, industry, line of business, or profession.

  On the geographic locale point, the Department has clearly found that employers in different lines of business but in the same state can participate in the same MEP. In light of the invalidity of the geographic limitation, the only viable solution is to permit employers in different lines of business throughout the country to participate in the same MEP, provided that the MEP meets the bona fide group requirements described below.

- **Control requirements:** Section 2510.3-55(b)(1)(iv) of the proposal would require that the functions and activities of a "bona fide" group or association are controlled by its employer members, and that the members that participate in the plan control the plan. We recommend that the Department eliminate this requirement, since it has no basis in policy or the statute.

  Because employer membership in a group or association is presumably always voluntary, employers would already exercise control to the extent that

they choose whether to participate in the plan. This is functionally equivalent to the pre-approved plan context where an employer may have little or no say with respect to the terms or operation of a plan, yet the employer is able to exercise ultimate "control" in deciding whether to begin or cease offering the plan to its employees. If greater control is not required in the single employer plan context, why should it be required for a MEP?

- **Prohibition on banks and certain other firms from being or owning the group or association:** Section 2510.3-55(b)(1)(vii) of the proposal would generally prohibit a "bona fide" group or association of employers from being a bank or trust company, insurance issuer, broker-dealer, or other similar financial services firm (including pension record keepers and third-party administrators), or from being owned or controlled by such an entity or any subsidiary or affiliate of such an entity.

  This condition generally does not appear to have a purpose, especially when considered in conjunction with the other requirements. First, a single entity of the type listed above cannot, under any imaginable definition, constitute a "group" or "association." Second, there is no policy reason to prohibit such entities from serving as an organizer or catalyst to forming a "bona fide" group or association, and the prohibited transaction rules would prevent such entities from overseeing themselves. Again, it should be a straightforward exercise to determine when an employment-based arrangement subject to ERISA is present, and the condition in (vii) serves no purpose in assisting this determination and ensuring that the Department is not regulating non-employment-based arrangements. Furthermore, eliminating any prohibition on banks or other financial institutions from playing a key role in the sponsorship or organization of a MEP would remove a key barrier to the development of a robust and competitive MEP marketplace – a result that is critical in leveraging the potential of MEPs to expand retirement plan coverage.

2. Requirements of a "Bona Fide" Group or Association of Employers that would be Appropriately Retained Based on ERISA's Statutory Language

In contrast to the unnecessarily restrictive requirements described above, we believe that the following requirements as set forth in the proposed regulation are helpful in fulfilling ERISA's statutory intent that ERISA-covered plans be limited to the employment context. As such, we recommend that the following three requirements be the only requirements placed on employer groups and associations in order for them to be considered "bona fide" for the purpose of sponsoring a MEP:

- **Employer members act directly as employer:** Section 2510.3-55(b)(1)(ii) of the proposal would require each employer member of the group or association

that participates in the plan to act directly as an employer of at least one employee who is a participant under the plan. We believe this requirement very appropriately helps to distinguish employer-based arrangements from those that are not by requiring an employment connection with respect to each member participating in the MEP. As discussed above, this should be the primary concern of the Department when determining whether a MEP offered by a group or association is appropriately covered under ERISA.

- **Formal organizational structure:** Section 2510.3-55(b)(1)(iii) of the proposal would require a "bona fide" group or association to have a formal organizational structure with a governing body, and to have by-laws or other similar indications or formality. We believe this requirement is appropriate in helping to ensure the presence of a legitimate group or association. This condition could include the requirement that the governing documents provide a mechanism for the group to act (with respect to plan amendments, for example) through a designated entity or entities.

- **Restriction on plan participation:** Section 2510.3-55(b)(1)(vi) of the proposal would prohibit a "bona fide" group or association from making plan participation available to anyone other than employees and former employees of the employer members (and their beneficiaries). This requirement is another very appropriate condition that would help ensure the MEP is indeed being offered by a group or association of employers to their employees and is thus an employment-based arrangement.

3. EXPANSION OF THE PROPOSED REGULATION TO DEFINED BENEFIT MEPS

As stated above, we ask that the Department expand the proposed regulation to defined benefit MEPs. The Department states in the preamble that the proposed rule does not involve defined benefit plans in part because "the Department's view is that such plans raise different policy considerations,"[14] yet the Department fails to describe what those different policy considerations are that justify the omission. In addition, as justification for excluding defined benefit MEPs, the Department notes that, according to the Government Accountability Office ("GAO"), "sponsorship of MEPs 'seems to be following the general trend away from traditional benefit plans and towards defined contribution plans.'"[15] It is unclear how the GAO's findings support the exclusion of defined benefit MEPs from the proposal – is the Department indicating that it supports this trend of employers moving away from defined benefit plans? Or is it the Department's position that there is no need to provide guidance that helps slow this trend by easing the burdens of offering or participating in a defined benefit MEP?

[14] *Id.* at 53,536.

[15] *Id.*

The omission of defined benefit MEPs from the proposal is further concerning when considering the Department's very clear preference for "simplicity and uniformity in regulatory structure."[16] Certainly defined benefit and defined contribution MEPs share more policy considerations than AHPs and defined contribution MEPs share. As such, we urge the Department to extend the same rules to defined benefit MEPs in the final regulation.[17]

4. RESPONSE TO SPECIFIC COMMENT REQUESTS AND COMMENTS ON OTHER ASPECTS OF THE PROPOSAL

- **Treatment of MEP as single plan:** The preamble to the proposal states that a MEP meeting the conditions of the proposed regulation would be treated as a single plan for purposes of ERISA rather than a collection of separate plans with respect to each participating employer.[18] We ask that the Department explicitly include this text in the final regulation itself.

- **Notice and reporting requirements:** In the preamble to the proposed regulation, the Department invited comments on "whether any notice or reporting requirements are needed to ensure that participating employers, participants, and beneficiaries of MEPs, are adequately informed of their rights or responsibilities with respect to MEP coverage and that the public has adequate information regarding the existence and operations of MEPs."[19] We believe that the robust notice and reporting requirements that currently apply to defined contribution plans are sufficiently protective of MEP participants, and that no additional notice or reporting requirements are warranted.

- **Joint employer and independent contractor considerations:** The Department noted in the preamble to the proposal that "nothing in the proposed rule is intended to suggest that participating in a MEP sponsored either by a bona fide group or association of employers or by a PEO gives rise to joint employer status under any federal or State law, rule, or regulation."[20] In addition, the Department stated that the proposal "should not be read to indicate that a business that contracts with individuals as independent contractors becomes the employer of the independent contractor merely by participating in a MEP with those independent contractors, who would participate as working owners, if applicable, or promoting participation in a MEP to those independent

[16] *Id.* at 53,540.

[17] We support the application of improved MEP standards to other types of ERISA-covered benefit offerings of multiple employers, such as life insurance and disability coverage.

[18] 83 Fed. Reg. 53,535

[19] *Id.* at 53,543.

[20] *Id.* at 53,537.

contractors, as working owners."[21] Such clarifications regarding joint employer status and independent contractor/employee determinations are very helpful and important, and we ask that the Department include this language in the text of the final regulation itself.

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Thank you for your consideration of our comments. Should you have any questions or wish to discuss our comments further, please contact me at (202) 289-6700 or by email at ldudley@abcstaff.org.

Sincerely,

Lynn D. Dudley
Senior Vice President, Global Retirement and Compensation Policy
American Benefits Council

[21] *Id.*