Michael Kreps
(202) 861-5415
mkreps@groom.com

December 21, 2018

*Submitted Electronically*

The Honorable Preston Rutledge
Assistant Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

**Re: Proposed Regulation – Definition of "Employer" under Section 3(5) of ERISA—Association Retirement Plans and other Multiple Employer Plans (RIN 1210-AB88)**

Dear Assistant Secretary Rutledge:

We write on behalf of a coalition (the "Coalition") of investment managers, recordkeepers, third party administrators, and trustees to provide comments on the regulation (83 Fed. Reg. 53534 (Oct. 23, 2018), the "Proposed Regulation") proposed by the Department of Labor (the "Department" or "DOL") defining "employer" for purposes of section 3(5) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The members of the coalition work with a large segment of the existing multiple employer plan ("MEP") marketplace and will be instrumental to efforts to establish and maintain defined contribution ("DC") MEPs and Association Retirement Plans.

As a general matter, the Coalition supports the Department's efforts to expand the availability of DC MEPs. However, we are concerned the Proposed Regulation will not be effective in achieving the Department's or the Administration's goals because of its narrow scope and restrictive conditions. Thus, we urge the Department to materially expand the rule in a manner more consistent with the plain language of ERISA. This is discussed in more detail below along with a number of other issues. We further request that the Department hold a hearing on the Proposed Regulation prior to issuing any final rule.

## COMMENTS

### I. The Coalition supports the Department's efforts to expand the availability of DC MEPs.

The Coalition strongly supports the goal of both the Proposed Regulation and Executive Order 12857 (Sept. 3, 2018) to increase opportunity for workers – particularly those working for small businesses – to save for retirement. Too many families lack access to a retirement plan at the workplace, putting their financial future at risk.

MEPs have the potential to expand retirement plan coverage and encourage retirement savings, and there is a bipartisan consensus that new rules should be put in place to facilitate MEPs. The Department's historic interpretation of ERISA section 3(5) with respect to DC MEPs was unnecessarily narrow and imposed conditions on MEP sponsorship and participation that are inconsistent with, or at the very least in excess of, the plain language of the statute. Prior subregulatory guidance stifled market innovation and likely resulted in lower rates of saving and plan participation.

Given that, the Coalition supports the Department's decision to issue new regulations under ERISA section 3(5) to facilitate DC MEP creation and agrees that neither the agency's prior guidance nor relevant court cases foreclose the Department from adopting a more flexible test in a regulation.[1] However, the Coalition urges the Department to materially expand the Proposed Regulation and eliminate many of the artificial constraints on DC MEP sponsorship and participation.

### II. The Department should expand the Proposed Regulation and eliminate restrictive conditions that are not consistent with the plain language of ERISA section 3(5).

Although the Department's regulatory efforts are commendable, the Coalition has serious concerns that the scope of the Proposed Regulation is too narrow, and its conditions are too restrictive, to meaningfully accomplish the Department's or the Administration's goals. Below, we provide comments and recommendations intended to make any final regulation more flexible and effective.

#### A. The Department should allow a service provider to sponsor a MEP where the service provider acts "indirectly in the interest of" employers by taking responsibility for traditional employer functions related to the plan.

The Department should expand the Proposed Regulation to allow service providers to qualify as DC MEP plan sponsors where such service providers are stepping into the role of the employer with respect to the plan and performing functions that are historically undertaken by

[1] 83 Fed. Reg. 28912, 28914 (June 21, 2018).

the employer. In such instances, the service provider is, and should be considered to be, acting "indirectly in the interest" of an employer for purposes of section 3(5).

The Coalition urges the Department to adopt an interpretation of section 3(5) – at least with respect to DC MEPs – based on the plain language of the statute rather than relying on prior guidance, much of which was developed with an eye toward policy concerns in the health plan context.[2] In that regard, section 3(5) expressly provides that an employer is "any person acting directly as an employer, or indirectly in the interest of any employer, *in relation to an employee benefit plan…* " (emphasis added). The most logical and intuitive interpretation of "in relation to an employee benefit plan" is that Congress intended for the person acting "indirectly in the interest" of an employer to be taking on the employer's traditional roles *with respect to the plan.* There is no indication that Congress ever intended to impose a requirement that the person acting "indirectly in the interest" of an employer have some relationship with the employer unrelated to the provision of benefits. And imposing such a condition would impermissibly nullify a material portion of the statutory provision (*i.e.,* "in relation to an employee benefit plan").[3]

The Department acknowledged in the preamble to the Proposed Regulation that commercial service providers may act "indirectly in the interest of" their clients but took the position that merely selling commercial products and services to employers does not convert them into ERISA-covered employers.[4] It is true that not all service providers should be "employers" for purposes of ERISA, but the ERISA definition of "employer" was specifically intended to encompass entities in addition to those acting as an employer under common law. In fact, there are three categories of "employers" under section 3(5) – common law employers, groups and associations of employers, and persons acting indirectly in the interest of employers in relation to a plan – and any one of those entities should be considered to be sponsoring a plan within the employment context.

Given the foregoing, the Proposed Regulation should be broadened to reflect the statutory language, namely that some entities who are not traditional employers may qualify as an ERISA "employer" if they take on sufficient responsibilities in relation to a plan. To distinguish

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[2] *See., e.g.,* Interpretive Bulletin 2015-02, 29 C.F.R. 2509.2015-02 (Nov. 18, 2015)("IB 2015-02")(concluding that a person will be considered acting "indirectly in the interest of an employer, in relation to a plan," if such person is tied to the contributing employers or their employees by genuine economic or representational interests unrelated to the provision of benefits).

[3] Courts have held that it is their "duty 'to give effect, if possible, to every clause and word of a statute.'" *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citations omitted); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 698 (1995) (holding statutory provisions should not be interpreted as surplusage, so as to avoid redundancy). As a result, courts have disagreed with agencies' interpretations of statutes that would not give effect to every word of a statute, or treat certain words or phrases as redundant. *See, e.g., Yith v. Nielsen*, 881 F.3d 1155, 1162 (9th Cir. 2018) (holding that agency interpretations of a statute were incorrect because they "treat[ed] distinct clauses as identical" and read the meaning out of specific terms); *Rojas v. Attorney Gen. of U.S.*, 728 F.3d 203, 209 (3d Cir. 2013) (holding agency interpretation of statute "rendering words therein superfluous" would not be upheld).

[4] 83 Fed. Reg. at 53539.

between normal service providers and those that are acting as "employers" under section 3(5), the Coalition proposes that the Department deem a service provider to be acting "indirectly in the interest of" an employer when the service provider assumes certain statutory roles – namely, as the plan sponsor (under ERISA section 3(16)(B)), the plan administrator (under ERISA section 3(16)(A)), and a named fiduciary (under ERISA section 402(a)) – and the service provider meets certain criteria intended to reflect plan-related functions that have historically been the province of the sponsoring employer. Specifically, the Coalition recommends the following test:

> *(X)(1) Bona Fide Institutional Plan Sponsor. An institutional plan sponsor is an organization that contracts with an employer to assume substantial administrative and fiduciary responsibilities with respect to an employee benefit plan. For purposes of title I of the Act and this chapter, a bona fide institutional plan sponsor shall be deemed to be acting indirectly in the interest of its employer clients and is capable of establishing a MEP. A bona fide institutional plan sponsor is an organization that meets the following requirements:*
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> > *(i) The organization performs substantial functions related to an employee benefit plan, as described paragraph (X)(2) of this section, on behalf of its client employers and maintains adequate records relating to such functions;*
> >
> > *(ii) The organization has substantial control over the functions and activities of the MEP, as the plan sponsor (within the meaning of section 3(16)(B) of the Act), plan administrator (within the meaning of section 3(16)(A) of the Act), and a named fiduciary (within the meaning of section 402 of the Act) of the plan;*
> >
> > *(iii) The organization knows or reasonably believes that each employer that adopts the MEP acts directly as an employer of at least one employee who is a participant covered under the defined contribution MEP or is a working owner; and*
> >
> > *(iv) The organization knows or reasonably believes that participation in the MEP is available only to employees and former employees of the organization (and their beneficiaries), employees and former employees of contributing employers (and their beneficiaries), and working owners.*
>
> *An organization may rely on written representations from the contributing employer and/or working owner for purposes of paragraphs (iii) and (iv).*
>
> *(X)(2) Criteria for substantial functions related to an employee benefit plan. The criteria in this paragraph (X)(2) are relevant to whether an institutional plan sponsor performs substantial functions related to an employee benefit plan on behalf of its client employers. Although a single criterion alone may, depending on the facts and circumstances of the particular situation and the particular criterion, be sufficient to*

> *satisfy paragraph (X)(1)(i) of this section, as a safe harbor, an organization shall be considered to perform substantial functions related to an employee benefit plan on behalf of its client employers if the organization meets [three] or more of the following criteria:*
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> > *(i) The organization is responsible for participants' enrollment in the plan, including preparing enrollment materials, processing enrollment applications, and educating participants regarding plan participation;*
> >
> > *(ii) The organization assumes responsibility for educating participants with respect to the operation of the plan and the benefits provided thereunder, including the preparation of educational information related to investment and distribution options under the plan;*
> >
> > *(iii) The organization is responsible for preparing required disclosures for participants, including the disclosures required under sections 101 of the Act and 29 C.F.R 2550.404a-5;*
> >
> > *(iv) The organization is responsible for making determinations with respect to claims for benefits under the plan;*
> >
> > *(v) The organization is responsible for processing loans, hardship withdrawals, and Qualified Domestic Relations Orders with respect to the plan; and*
> >
> > *(vi) The organization continues to have employee-benefit-plan obligations to MEP participants if an employer ceases to participate in the MEP.*

A service provider meeting the conditions outlined above is not merely selling a product. It is, in fact, taking on many of the employer's traditional roles with respect to the plan, including the responsibility to prudently managing the operation and administration of the plan. In so doing, the service provider is agreeing to be held to a the highest standard of care under the law, and it is subject to very real limitations on its ability to limit liability, including the limitations on indemnification under ERISA section 410(a).

As a policy matter, allowing service providers to sponsor MEPs can actually help make the plans more protective of participants. Service providers are experienced and subject to considerable oversight, often at both the federal and state level. Moreover, the fiduciary protections afforded by ERISA are only as good as the entity that stands behind them, and service providers generally have more resources at their disposal to make participants whole in the event of an issue. Importantly, the Department could allow service providers to serve as a MEP sponsor knowing that the ERISA prohibited transaction rules would serve as a check on a service provider setting its own compensation.

**B. The Department should eliminate other conditions of the Proposed Regulation that are not derived directly from the text of ERISA.**

The Proposed Regulation includes a number of restrictions on who can qualify as a "bona fide" group or association of employers that bear little-to-no relationship to the plain language of section 3(5). Specifically, the Coalition believes that imposing the following conditions both exceeds the Department's interpretive authority and is not necessary from a policy perspective:

- Substantial business purpose requirement. The Proposed Regulation requires bona fide groups or associations of employers 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." This requirement has no basis in the statute, which expressly refers to the activities being conducted in relation to a plan. Moreover, it is counterproductive because it materially limits the types of organizations that can sponsor a MEP while providing no additional protection for participants.

- Commonality requirement. The Proposed Regulation requires employer members of a bona fide group or association to have a commonality of interest (*i.e.,* be in the same trade, industry, line of business, or profession or have a principal place of business in the same region that does not exceed the boundaries of a single state or metropolitan area). The commonality requirement is an artificial construct that has no basis in the statute. Rather, it was a concept created by the Department through subregulatory guidance to address policy concerns primarily in the health plan context, which are not relevant to DC retirement plans (discussed below). There is no clear policy justification for a rule that focuses on where participating employers are located or their business activities because those factors are irrelevant to the provision of DC retirement benefits. The requirement merely serves to create arbitrary barriers to MEP participation that could impact plan participation without any additional protections for plan participants.

- Control. The Proposed Regulation requires that the functions of the bona fide group or association be controlled by employer members. It further requires that the members have a degree of control over the plan. Once again, this condition is not based on the statutory language. The Department appears to presume that, from a policy perspective, there is some benefit from forcing associations to allow employer members to exercise control over the association and the MEP. However, member employers always have a control because they participate in MEPs on a voluntary basis. If an employer is dissatisfied with the plan, it has the right to stop participating. Even more importantly, it has a fiduciary obligation to prudently select and monitor the MEP. Thus, there is no need to impose potentially burdensome additional requirements on DC MEPs.

Each of these conditions complicates MEP formation and will increase the cost of providing benefits. They are also not necessary to protect participants as they do not apply to DC single-employer plans, and the Department has not indicated that DC MEPs pose any unique risk to participants. In fact, the Department acknowledged that it is not aware of direct evidence that DC MEPs present a greater risk of fraud or abuse than single-employer DC retirement plans.[5] The Department's primary justification for including the conditions appears to be a desire to harmonize the Proposed Regulation with the Association Health Plan ("AHP") regulation, which is neither necessary nor advisable.

### C. There is little-to-no benefit derived from a uniform regulatory structure for DC MEPs and AHPs.

We understand that the Department's decision to materially limit the scope of the Proposed Regulation was, in large part, to harmonize the DC MEP and AHP rules. The Department's rationale is that "applying a similar understanding of 'group or association' of employers in the pension context as in the AHP context promotes simplicity and uniformity in regulatory structure."[6] The Department does not further explain why similar AHP and MEP rules would be simpler or why uniformity is beneficial. However, the Coalition does not believe there is any material advantage to having substantially similar rules, and doing so ignores the fact that health plans and DC retirement plans raise very different policy issues and concerns.

DC retirement plans and health plans are fundamentally distinct in material ways. Most importantly, the nature of the benefits being promised – and the risks for participants – are very different. DC retirement plans provide a mechanism for accumulating assets for retirement, and the only guarantee is that the participant will be entitled to receive the balance of his or her account, the value of which depends on investment performance, fees, and expenses. Health plans, on the other hand, promise to provide medical-related benefits, the cost of which is not knowable until after the benefit promise has been made.[7] Thus, the risks to participants in health and DC retirement plans are very different, and different rules may be necessary.

As the Department previously noted, there is legislative history indicating that some in Congress may have recognized the unique risks of health plans and intended a more limited interpretation of "employer" under ERISA in that context.[8] Specifically, there were concerns

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[5] 83 Fed. Reg. at 53544.

[6] 83 Fed. Reg. at 53540.

[7] In that way, the risk to participants posed by a health plan is more akin to a defined benefit pension plan, and neither the Department nor the Coalition are proposing to create new rules for defined benefit MEPs.

[8] 83 Fed. Reg. 28913 (citing *The Report of the Committee on Education and Labor*, H.R. Rep. No. 1785, 94th Cong., 2d Sess. 48 (1977)). Although helpful in identifying policy issues, this legislative history was not contemporaneous with the passage of ERISA, and the Supreme Court held that "post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011). *See also Wright v. West*, 505 U.S. 277, 295 n.9 (1992) ("We have grave doubts that post-1966 legislative history is of any value in construing its provisions, for we have often observed that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'") *(quoting U.S. v. Price*, 361 U.S. 304, 313 (1960)); *Consumer Prod. Safety Commn. v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980) ("[E]ven when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.").

that certain health insurance programs were being established as "employer provided plans" to take advantage of ERISA's broad preemption of state insurance regulation. The relevant state insurance regulations are largely intended to ensure that health plans have sufficient resources to pay the promised benefits, which is particularly important given the fact that the ultimate cost of the benefits are unknown at the time the promise is made. However, that concern is not relevant to DC retirement plans.

Importantly, the Department recognizes that health and retirement plans pose differing policy considerations and routinely exercises its authority to interpret the same provision of ERISA differently. For example, the Department has differentiated between health and retirement plans with respect to participant fee disclosure, service provider fee disclosure, the ERISA trust requirements, the definition of plan assets, and claim review standards. In fact, the Department implicitly acknowledged in the preamble to the Proposed Regulation that the Department can interpret section 3(5) differently with respect to different types of plans as the Proposed Regulation does not cover defined benefit plans "in part, because the Department's view is that such plans raise different policy considerations."[9]

## III. Additional Comments

### A. The Department was correct not to impose a nondiscrimination condition on DC MEPs.

We agree with the Department's decision not to impose on DC MEPs a provision analogous to the healthcare nondiscrimination provision of the AHP regulation. Such a rule is unnecessary as the tax qualification provisions of the Internal Revenue Code of 1986, as amended (the "Code"), already adequately address nondiscrimination concerns. We agree with the Department that plans with lifetime income investment features do not raise material concerns because insurers, and not plans, underwrite the risk being insured.

### B. The Department's position with respect to the allocation of fiduciary responsibility between MEP sponsors and participating employers is correct.

The Coalition agrees with the Department's position that employers participating in a MEP should bear fiduciary responsibility for selecting and monitoring the arrangement and forwarding required contributions. Even where a MEP plan sponsor takes on fiduciary status as a named fiduciary under ERISA section 402 or the plan administrator under ERISA section 3(16)(A), it is in the interest of participants and beneficiaries that the participating employers retain responsibility for oversight of the plan. Further, deviating from the existing framework for allocating fiduciary responsibility may create an incentive for employers with existing plans to transition to a MEP for the sole purpose of limiting their liability. That could result in material market disruptions that would not benefit participants.

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[9] 83 Fed. Reg. at 53536.

**C. There is no need for additional guidance with respect to the allocation of MEP fees and expenses.**

In the Proposed Regulation, the Department opined that the MEP sponsor, typically acting as the plan's administrator and named fiduciary, "must be neutral and fair, dealing impartially with the participating employers and their employees," and that the Department would have "serious concerns" if a fiduciary were to treat participating employers and their employees differently without a reasonable and equitable basis. The Department invited comments as to whether there is a need for clarification or additional guidance with respect to this principle with respect to, for example, the allocation of costs and investments.

Field Assistance Bulletin 2003-03 (May 19, 2003) ("FAB 2003-03") already provides guidance with respect to the allocation of expenses, and we urge the Department to clarify that the positions in FAB 2003-03 are applicable to all defined contribution plans, including MEPs. Specifically, any final rule – or the preamble to any final rule – should expressly adopt the Department's longstanding position that plan sponsors and fiduciaries have considerable discretion in allocating fees and expenses to participants and beneficiaries. The Coalition agrees with the Department's assertion in FAB 2003-03 that "where the method of allocating expenses is determined by the plan sponsor (*i.e.,* set forth in the plan documents), fiduciaries, consistent with section 404(a)(1)(D), will be required to follow the prescribed method of allocation" and that "the fiduciary's obligation in this regard does not change merely because the allocation method factors a class (or classes of participants)." Moreover, where the plan documents are silent, the Coalition agrees with the Department's position that "a method of allocating expenses would not fail to be 'solely in the interest of participants' merely because the selected method disfavors one class of participants, provided that a rational basis exists for the selected method."

There is nothing so unique about the MEP structure that necessitates a fundamentally different approach with respect to the allocation of fees and expenses. A MEP sponsor should have the same flexibility as any plan sponsor to specify the allocation of fees and expenses in the plan documents, and the participating employers can determine whether the proposed arrangement is prudent. Similarly, the MEP fiduciary should have the same discretion as any other DC plan fiduciary to allocate fees and expenses amongst participants, provided there is a reasonable basis for the decision.

**D. The Department should clarify the effect of any final regulation on IB 2015-02.**

IB 2015-02 provides guidance with respect to the creation of state-sponsored MEPs. We understand that it was not the Department's intent to overturn that guidance by issuing a new regulation under section 3(5). However, the preamble to the Proposed Regulation broadly states that the new rules would "supersede subregulatory interpretative rulings under ERISA section

3(5)…."[10] That statement creates confusion with respect to the Proposed Rule's effect on IB 2015-02, which interprets section 3(5), so it would be helpful for the Department to clarify its intent.

### E. The Department should clarify that the MEP rules are applicable to ERISA-covered 403(b) plans and coordinate with its sister agencies to resolve investment-related issues.

In the preamble to the Proposed Regulation, the Department states that the new rules would apply to DC plans as defined under ERISA section 3(34).[11] Given that, we presume that the Department intended to allow an ERISA-covered 403(b) plans to operate as a MEP. It would be useful to explicitly confirm as much in any final regulation.

Additionally, we encourage the Department to explore with the Securities and Exchange Commission and the Internal Revenue Service (the "IRS") whether it is possible to issue additional guidance – or make recommendations to Congress - to facilitate the investment of 403(b) MEPs. In particular, there are material limitations in both the Code and the securities laws that could limit 403(b) MEPs from investing in collective investment trusts and certain group annuity contracts. Those limitations often result in 403(b) plans not having access to the most economically efficient investment options.

### F. Guidance on the "one bad apple" rule would be useful.

The Coalition is strongly supportive of efforts by the Treasury Department and the IRS to develop new, workable rules that help facilitate MEP administration. It is important that the agencies provide clear guidance to address instances where one employer participating in a MEP has a qualification issue under the Code that jeopardizes the qualified status of the entire MEP and fails to take the appropriate action to correct the qualification issue. In that regard, we have attached for your information the Coalition's October 22, 2018 letter to the Treasury Department and the IRS, which suggests two possible approaches.

## REQUEST FOR HEARING

In order to ensure that all of the relevant issues are fully vetted – and that any new rules achieve their objectives – we respectfully request that the Department hold a hearing on the Proposed Regulation in advance of finalizing any new rules.

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[10] 83 Fed. Reg. at 53536.
[11] 83 Fed. Reg. at 53539.

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We appreciate the opportunity to comment on the Proposed Regulation. Please do not hesitate to contact us with any questions or discuss these issues in more detail.

Sincerely,

Brigen L. Winters

Michael Kreps          David Levine          Brigen Winters

GROOM LAW GROUP

David N. Levine
(202) 861-5436
dlevine@groom.com

Michael P. Kreps
(202) 861-5415
mkreps@groom.com

October 22, 2018

**By Email and Regular Mail**

Ms. Victoria A. Judson
Division Counsel/ Associate Chief Counsel Tax Exempt & Government Entities
Internal Revenue Service
1111 Constitution Avenue NW 4306 IR
Washington, DC 20224

Mr. Seth H. Tievsky
Senior Technical Advisor
Employee Plan Rulings & Agreements
Internal Revenue Service
999 North Capitol Street NE
Washington, DC 20002

Ms. Carol A. Weiser
Acting Benefits Tax Counsel
Office of Tax Policy
U.S. Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

**Re: Qualification Requirements for Multiple Employer Plans**

Dear Mesdames and Sir:

Our firm, Groom Law Group, Chartered, represents a coalition of investment managers, recordkeepers, third party administrators, and trustees servicing multiple employer plans ("MEPs"). The members of the coalition work with a large segment of the existing multiple employer plan marketplace and will be instrumental to efforts to establish and maintain Association Retirement Plans ("ARPs").

We write with respect to the direction in President Trump's August 31, 2018, Executive Order on Strengthening Retirement Security in America (the "Executive Order") that the Department of the Treasury consider proposing amendments to regulations or other guidance within one-hundred-eighty (180) days of the Executive Order addressing the circumstances under which a MEP may satisfy the tax qualification requirements set forth in the Internal Revenue Code of 1986 (the "Code"), including the consequences if one or more employers that sponsored or adopted a MEP fails to take one or more actions necessary to meet those requirements.

The coalition strongly supports the directive set forth in the Executive Order. The refinement of the rules for existing MEPs and the creation of ARPs has the potential to dramatically affect the retirement system. The coalition also supports new, workable rules that help facilitate MEP and ARP administration and believes it is critically important that the Service and Treasury provide clear guidance to address MEP and ARP instances where one participating employer (and "Adopting Employer") has a qualification issue that jeopardizes the qualified status of the entire MEP or ARP and fails to take the appropriate action to correct the qualification issue. In that regard, the coalition suggests that the Service and Treasury take one or both of the following actions:

- *Expansion of Self-Correction Under EPCRS*. Revenue Procedure 2018-52 provides numerous opportunities for self-correction of operational, rather than plan document, errors under the Service's Self-Correction Program ("SCP"). Providing SCP relief for operational errors by an employer that participates in a MEP or ARP is consistent with Congress' ongoing support of the expansion of the Employee Plans Compliance Resolution System ("EPCRS") and the SCP program specifically and is within the scope of the Service's and Treasury's regulatory authority. Given that, the Service and Treasury could expand EPCRS to provide a process by which one "bad apple" Adopting Employer is spun out of a MEP if its actions would cause a qualification failure for the MEP.

- *Application of Tax-Qualification Requirements on an Employer-by-Employer Basis.* Code section 413(c) sets forth specific rules establishing when a MEP is treated as a single plan for Code purposes. Notably, Code section 413(c), as the core Code provision governing the application of the qualification rules for MEPs, does not require that the tax qualification requirements be applied to all employers in the aggregate. Given that, the Service and Treasury could issue guidance under Code section 413(c) indicating that a qualification or operational failure by one Adopting Employer only disqualifies a MEP or ARP with respect to entities in the Adopting Employer's controlled group.

We elaborate further on each of these approaches below and would appreciate the opportunity to meet with you to discuss these and other potential approaches you may be considering to address the directive in the Executive Order.

## I. Expansion of Self-Correction Under EPCRS

The coalition greatly appreciates the continued development and expansion of the EPCRS program since its predecessor programs were first introduced in the 1990s. As the SCP is primarily focused on the self-correction of operational failures, it would be reasonable to expand the SCP program to address the failure of an Adopting Employer to satisfy the operational provisions of a compliant plan document. Such an expansion would be consistent with Congress' prior legislative direction to the Service and Treasury to update and improve the EPCRS program "taking into account special concerns and circumstances that small employers face with respect to compliance and correction of compliance failures."[1] It would also align with the Executive Order's focus on small and mid-sized businesses.

Therefore, the coalition suggests expanding the SCP to remedy the operational failure of an Adopting Employer. We further recommend that the SCP allow for non-compliant Adopting Employers to have two years from the date of the operational error to remedy the operational failure within the MEP or ARP. If not corrected within this two-year period, the non-compliant Adopting Employer then would be required to be spun out of the MEP or ARP into a single employer plan no later than six months following the end of the two-year period. A MEP or ARP fiduciary should also be granted discretion to proceed directly to the spin-out approach and not wait for the two-year period. Providing this flexibility is also consistent with EPCRS' recognition that there are often multiple permissible ways to correct an operational failure.

This proposed approach would address the directive in the Executive Order, would be consistent with the Service's and Treasury's authority, and would also, because of its fixed timeframes, provide for consistent rules with minimal risk of potential misuse.

## II. Application of Tax-Qualification Requirements on an Employer-by-Employer Basis

Although the coalition strongly believes that it is well within the Service's and Treasury's authority to expand the SCP as suggested above, the coalition also believes there is another method by which the Service and Treasury might address the directive in the Executive Order. Specifically, the coalition suggests that the Service exercise its rulemaking authority to issue additional regulations under Code section 413(c).

Code section 413(c) provides specific rules for defined contribution MEPs addressing the following key Code requirements: (1) the Code section 410(a) participation requirements, (2) the

[1] Pension Protection Act of 2006, Pub. L. 109-280, § 1101(b)(2), 120 Stat. 780 (2006).

Code section 401(a)(2) exclusive benefit rule, and (3) the Code section 411(a) vesting rules. The remainder of the rules mainly apply to defined benefit MEPs. Limited additional guidance is provided in Treasury Regulation section 1.413(c)-2. Code section 401(b) and Treasury Regulation 1.401(b)-1 do not address how the Code's remedial amendment rules apply to MEPs.[2]

Because there is no guidance on point addressing the distinctions between Adopting Employers, the Service and Treasury could issue guidance under Code section 413(c) (1) recognizing that the operational error of a single Adopting Employer should not expose a MEP or ARP to disqualification other than with respect to the Adopting Employer and its controlled group and (2) interpreting the Code section 401(b) remedial amendment rules to provide that a failure to timely amend a participating employer agreement would, if it creates a plan document failure, only disqualify the MEP or ARP with respect to the single, non-compliant Adopting Employer and members of its controlled group.

We note that this approach is consistent with existing precedent. For example, some plan sponsors, in the past, have utilized a single document for multiple plans and received multiple favorable determination letters from the Service. Similarly, in the governmental plan space, a common plan document has been used for multiple "plans" even though there is one central entity (like a MEP provider or a legislature) that controls the base plan document.

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[2] Notably, in Treasury Decision 7654 (Jan. 1, 1979), the Service and Treasury specifically stated that "However, in the rare case of total disqualification, hardship could result to the offending and nonoffending employers maintaining the plan. Although no exceptions to total disqualification are provided in the final regulations, it is expected the Service's administration of these provisions may shelter innocent and nonnegligent employers from some of the harsh results of disqualification. Accordingly, in a proper case, the Commissioner could retain the plan's qualified status for innocent employers by requiring corrective and remedial action with respect to the plan such as allowing the withdrawal of an offending employer, allowing a reasonable period of time to cure a disqualifying defect, or requiring plan amendments to prevent future disqualifying events."

We appreciate your time and consideration. Please call David Levine (202-861-5436) or Michael Kreps (202-861-5415) if you have any questions. We look forward to scheduling a meeting to discuss our comments further.

Very truly yours,

David N. Levine

Michael P. Kreps

cc: Brigen L. Winters