



October 29, 2019

The Honorable Preston Rutledge
Assistant Secretary
Employee Benefits Security Administration
Room N-5655
US Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: RIN 1210-AB92
“Open MEPs (Multiple Employer Plans)” and Other Issues under Section 3(5) of ERISA

Dear Assistant Secretary Rutledge:

AARP is pleased to submit the following comments in response to the Department’s Request for Information (RFI) on whether to amend its regulations to facilitate the sponsorship of “Open MEPs” by persons acting indirectly on behalf of unrelated employers and employees for the purpose of safely saving for retirement.¹ A multiple employer plan or MEP is a single plan maintained by more than one employer for the purpose of providing retirement benefits to the employees of two or more employers.

AARP applauds the Department for striving to issue rules that will help enable employers and financial service firms to offer appropriate retirement savings vehicles for the millions of workers without retirement coverage. Most workers want to save for retirement and numerous surveys have found that workers want their employers to offer retirement savings programs. Yet, 55 million American workers lack a way to save for retirement via payroll deduction. While large employers generally have the staff and resources to sponsor retirement plans, smaller employers have struggled to do so. Employers of all sizes also have debated how best to offer retirement savings options for less than full-time, full-year workers.

Fortunately, the retirement savings market has developed considerably in recent years with more successful retirement focused investments and lower fees. There is a well-developed private market of firms that advise on how to set up and operate plans, administer plans, offer appropriate retirement investment options, and comply with all legal requirements. Still, it often remains challenging for employers with few staff and resources to find and assess these firms, their capabilities, and strengths and weaknesses. Smaller employers want and need reasonable

¹ AARP, with its nearly 38 million members nationwide, is a nonpartisan, nonprofit, organization that helps empower people to choose how they live as they age, strengthens communities, and fights for the issues that matter most to families, such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse.

and clear rules, both for the employer and the MEP. Sponsoring a retirement plan includes many elements, and the Department must ensure proper oversight of each function -- whether by the employer or the MEP -- as part of any rule encouraging a well-functioning multiple employer retirement system.

AARP's comments will mainly respond to select Department RFI questions for which we have views. AARP previously submitted detailed comments on the issues and needed guidance for all MEPs as part of the Department's proposed rule on the Definition of Employer – Association Retirement Plans (RIN 1210-AB88) which are attached and included for reconsideration as part of this RFI.

AARP Comments and Recommendations:

A.1. Should the Department expressly permit financial institutions or other persons to maintain a single defined contribution retirement plan on behalf of multiple unrelated employers?

AARP would strongly prefer to avoid the inherent conflicts that will arise should financial institutions that sell retirement plan investment products and services also be permitted to operate as MEPs. However, if such permission is granted, the Department should require adequate public notice, DOL guidance and oversight, clear employer and provider fiduciary responsibilities, and conflict of interest prohibitions.

The Department's RFI notes the key dilemma -- can a commercial enterprise act as a "plan sponsor, plan administrator and named fiduciary" if there are "potential conflicts of interest." While the RFI appears to envision a "single" plan that acts as a "sponsor, administrator and named fiduciary," that is not our understanding of how all financial service providers likely would operate open MEPs. There are three main options that policymakers and financial service firms have suggested to operate an open MEP. The preferred option would be a program operated by one entity which acts as the plan sponsor, plan administrator and investment adviser to the MEP, and thus the entity would be the fiduciary to the MEP for all of those activities. To avoid conflicts of interest, the entity would vet and monitor independent administrative and investment products, and would not sell any financial products or services that would create possible conflicts of interest. A second option would be for an administrative services provider to operate a MEP as a fiduciary and contract for competitively awarded investment options, again provided the administrative firm does not have any financial conflicts with an investment firm or any other provider. The third variation, subject to the most conflicts, is a single firm that provides advisory, administrative and investment services, and does not act in a full fiduciary capacity. All three of these models exist in the current marketplace, and the Department should separately ensure any final rules appropriately apply ERISA's requirements and protections to employers and employees in all situations. In particular, the Department should require that the last variation, if permitted, to include appropriate contracting with an independent fiduciary to assure all products and services are prudent, fairly priced, and solely in the interests of

participants and beneficiaries. Regardless of the structure(s) permitted, conflicts of interest should be proscribed.

AARP notes our support for the Retirement Enhancement and Savings Act, which would permit the creation of open MEPs, was based in significant part on the legislation's inclusion of the following specific requirements:

- All MEP entities must act in a fiduciary capacity,
- MEPs cannot charge unreasonable fees;
- MEPs must register with DOL;
- DOL will develop a model plan; and
- DOL will issue all needed standards.

The pending legislation does not explicitly address the issue of MEP provider conflicts of interest from the sale of other products and services; however, the legislation does reiterate the employer's fiduciary obligation to prudently select and monitor the MEP and its services and does not waive any of ERISA's fiduciary duties or prohibitions on conflicts of interest. We recommend that any DOL rule make clear key employer and MEP responsibilities.

2. What type of person or persons should be recognized as capable of being an “employer” under the “indirectly in the interest” requirement and any appropriate limitations?

As AARP noted in our prior comments, the Department should establish minimum standards to ensure that persons are capable of serving “indirectly in the interest” of an employer. The key types of standards should include:

- Minimum years of experience providing applicable retirement benefit services;
- Minimum key staff qualifications;
- Minimum capital reserves; and
- Minimum bonding and fiduciary liability insurance.

In addition, the Department should make it easy for employers and employees to find, assess, and monitor such persons. The Department should require all persons to notify the Department of their intention to act as a MEP (adviser or provider) and should annually publicly report on these persons and their services. Such transparency will help to minimize “bad actors.”

The Department also should issue guidance on which entity – employer or entity acting as a MEP – is responsible for each ERISA required function. The clearer that the Department can lay out which entity must do what, the simpler the process will be for employers and the smaller the chance for misunderstanding or financial abuse. The Department should be clear that under all circumstances the employer must prudently select and monitor the MEP and its key providers and services. There should be no scenario under which an employer can simply select any MEP provider and do nothing further. The more that the Department can clearly spell out the

employer's duties and the MEP's duties, the more likely the employer will be able to comply and the MEP will successfully serve the employer and its employees. The Department previously on occasion has provided different types of checklists, and a similar checklist is likely to be extremely helpful in clarifying and assigning duties among each entity. MEPs should be required to provide this information on employer and MEP duties, reasonably in advance of an employer joining the MEP.

3. If a commercial entity could “sponsor” an open MEP, what conflicts of interest, if any, are likely, including with respect to compensation, fees, products and services, prohibited transactions, etc.?

There are two main MEP functions – administrative operation of the retirement plan (MEP) and prudent investment of employer and employee contributions. As we noted above, depending on the Department's regulations, the MEP could be an adviser, administrator, or an all-in-one adviser, administrator, and investment firm.

The most protective, least conflicted model would limit and permit MEPs where the MEP is mainly an adviser or administrator. Employers should be clearly required to prudently select and monitor the adviser or administrator who is contractually agreeing to organize or administer the MEP. In the adviser model, the adviser would agree to serve as a fiduciary and undertake a prudent process to hire an administrative firm to administer the MEP and select and monitor investment firms and investment choices, including a default investment. The employer would still be responsible for prudently selecting and monitoring the adviser and its services. The DOL should require the adviser to clearly and reasonably in advance disclose all of its fees and any conflicts of interest. The employer would negotiate and agree to all fees and charges. DOL should recommend that employers consider at least three firms (if available), how long the MEP has operated, the number of actively enrolled employers and employees, all investments and fees, any conflicts of interest, etc. The adviser's services should be limited to advice and monitoring, the adviser should serve as a fiduciary, and no conflicts of interest should be permitted.

In the administrative model, a qualified administrative service firms would agree to provide MEP administrative services and contract for investment management services. The employer should again be clearly required to prudently select and monitor the administrative services firm and the investment services recommended. The employer would negotiate and agree to all fees and compensation. The administrative services firm should agree to serve as a fiduciary and not have any conflicts of interest (i.e., the adviser cannot earn or accept compensation from any financial services firm or products.)

For all employers and persons performing services for a MEP, the Department should clearly highlight that when the employer or entity selects any investment option, the employer must act in a fiduciary capacity. Additionally, the Department also should be very clear that no entity participating in or affiliated with a MEP may accept any financial incentive to select an investment product in the MEP.

The most opaque and conflict-ridden relationship is the person/firm that wants to offer all-in-one services – to advise on which firm to select and services to offer, to administer the MEP, and to offer its own proprietary investments in the plan, in whole or in part. AARP would prefer that DOL not permit such entities to serve as MEPs, given the inherent conflicts and likely higher costs. Employers will rarely be able to understand each of the services, financial relationships, and monetary charges paid by employers and participants. Employers will have little to no ability to negotiate different services or costs. Should the Department consider the inclusion of such financially conflicted firms, AARP urges that the all-in-one firm be required to retain an independent fiduciary to review, monitor, and approve the appropriateness of provided services and fees. Such independent fiduciaries should be appropriately licensed and switched periodically to ensure they do not become captured/co-opted financially. Even under this scenario, the employer should still be required to prudently select and monitor the all-in-one MEP firm, although this may be a difficult challenge for most small employers.

4. Should MEPs be required to have commonality and control requirements? What principles or other conditions are needed for open MEPs?

While AARP believes that permitting different types of employers to join the same MEP may not be problematic, requiring or encouraging some employer control of the MEP would be beneficial for two reasons. First, employers, especially small employers, generally know little about key retirement plan functions and operations. Encouraging or requiring some employer involvement, possibly through an advisory committee, will improve and enhance employer knowledge and oversight over a MEP. Second, greater employer involvement will make the MEP more responsive to employer and employee needs and requirements. Such a structure is closer to and compatible with the closed MEP structure. Under any structure for a MEP, employers should still have an on-going fiduciary duty to prudently select and monitor the MEP provider and investment options of the plan as well as to ensure the MEP providers act solely in the interests of participants and beneficiaries. Of course, this requirement is important because the employer is more likely to be free of conflicts of interests. The greater the employer role, the greater the employer knowledge, and the greater the likelihood of reduced legal jeopardy or misunderstanding for all parties.

The DOL should clearly set forth the obligations and liabilities of both the employers and MEP providers. Different entities may be fiduciaries for different purposes, but all ERISA duties should continue to apply. Accordingly, AARP submits that any regulation must make clear which entities are fiduciaries and for what fiduciary duties they are responsible. Commentators have different views concerning whether the employer(s) are the fiduciaries or whether the providers establishing and operating the MEP are the fiduciaries. The regulation must make clear what entity is the fiduciary, and participants should be provided notice with that information. The lack of a clear definition of what entity is the fiduciary, and for what duties, will simply lead to greater confusion and more litigation, and ultimately more harm to participants. The DOL and the participants should not have to go court to resolve these questions.

As a corollary, we suggest that the DOL specifically designate what entity is responsible for meeting the requirements of ERISA section 412 and its interpretive regulations (29 C.F.R. § 2550.412-1 and 29 C.F.R. Part 2580). We also suggest that the DOL increase the amount of the fidelity bond required for MEPs. In addition, the DOL should consider a net capital requirement in order to ensure that the MEP provider will be able to operate and meet its obligations. See response to question A.1.

Because numerous statutory provisions designate the plan administrator as the entity which holds the statutory obligation (e.g., ERISA reporting and disclosure requirements at ERISA sections 101-110), AARP submits that the regulation should specify which entity holds the obligations designated to the plan administrator. (This is assuming that the MEP provider has not specifically accepted that responsibility). Of course, in compliance with current law and regulations, the participants and beneficiaries would receive notification of the identity of this entity. If the regulation does not so specify, participants will assume that the plan administrator is their own employer.

5. What form should DOL require MEPs to conform to?

See all comments above.

AARP suggests that the DOL may first wish to authorize a more protective, less conflicted form of a MEP to determine its efficacy and potential problems. (See response to question A.1.) The DOL would have the benefit of learning both the pros and cons of that form of MEP and could subsequently authorize other forms of MEPs using that information to improve the alternative forms.

7. How to apply ERISA's requirements to open MEPs?

As we detailed in our comments on questions 2 and 3, DOL should review each of ERISA's key requirements and specify which function remains with the employer and which duties the MEP must carry out. If the Department decides to permit the MEP to vary ERISA's requirements, then the Department should require the MEP, in advance of any agreement, to provide separate written notice to each employer of their required functions and obligations. AARP details some specific concerns below.

The Department should provide clear guidance on whether the employer or the MEP will determine rules on employee coverage, automatic enrollment, employee contribution levels, employer contributions, investment options, default investments, fees, loans, pre-retirement withdrawals, forfeitures, distributions, and options. If the employer determines each rule, then the MEP will need to maintain multiple procedure and recordkeeping functions, which will likely increase costs. If the MEP determines these functions, then the system will be simpler, but the employer will be responsible for more actively understanding and reviewing the MEP

operations. Regardless of which entity makes those determinations, plan terms must be followed.²

All MEPs should be required to have written rules that are, in advance, provided to employers and participants. The MEP should largely have one set of rules that apply to all participating employers. If the Department permits MEPs to offer multiple, different options or packages, employers should be required to carefully review and prudently select among each option. (As noted previously, AARP believes such an approach is not a preferred option because reviewing and understanding option differences will be difficult for most small employers).

All participating employers should sign either the plan document itself or an agreement adopting the Plan document (adoption agreement). The DOL should specify which entity has the responsibility for ensuring that the participating employer has correctly completed the adoption agreement. If an adoption agreement is incorrectly completed, the DOL should determine the consequences for such failure, whether the failure can be corrected and prevented in the future, and which entity is responsible for the correction.³

The Department should require MEPs to at least annually report to employers and participants on plan operations. The Department also should clearly prescribe procedures for participants and beneficiaries to provide comments and complaints to employers and the MEP. The Department should consider developing a special MEP annual report so that employers and plan participants can assess plan operations. AARP supports the filing of a single MEP annual report (Form 5500). However, participants and beneficiaries will need clear guidance of the name of the plan and to easily be able to find the information by employer or plan name on DOL's website.

As under current law, either the employer or the MEP must be clearly required to provide participants and beneficiaries an annual statement of their earned benefits, investments and fees charges and all other required ERISA disclosures. In addition, the MEP must provide a notice to participants and beneficiaries detailing which entities are fiduciaries and an explanation of their fiduciary duties; if fiduciary duties are held by more than one entity, then the notice should explain which entity is responsible for which duties. As stated above, the regulation should designate which entity is the plan administrator so appropriate notice can be provided to the participants and beneficiaries. Moreover, the regulation should explicitly state that the plan participants and beneficiaries may obtain the contract between the participating employer and the MEP provider because such contract will be one of the "other instruments under which the [MEP] is established or operated" (in accordance with ERISA section 104(b)(4)).

² The Internal Revenue Service will need to assess the correct method of compliance testing to determine whether the MEP meets or the participating employers meet, among other standards, coverage, nondiscrimination, minimum participation, controlled and affiliated service group, and top-heavy rules. At some point in the near future, rules for termination of a participating employer's participation in a MEP or spinning off an employer's portion of a MEP to a stand-alone plan will need to be established. Similarly, rules for successor MEPs will need to be considered.

³ AARP notes that some failures many require the review of the Internal Revenue Service. See IRS Employee Plans Compliance Resolution System, EPCRS Overview, <https://www.irs.gov/retirement-plans/epcrs-overview>.

As we noted in our prior comments (to RIN AB88), any Department rule or guidance also should contain protections to minimize “failure” due to unpaid employer contributions or MEP provider fraud and abuse. AARP urges the Department to include clear requirements for timely reporting of missed or missing contributions or assets and protection of participant accounts and which entities are responsible for collection.

We foresee collection problems similar to those encountered by multiemployer plans and other plans. For example, if an employer fails to timely remit contributions, who has the responsibility to collect that money? As we have seen in the past, this is not merely a hypothetical situation, as employers with financial issues have previously tapped employees’ money to help the employer stay afloat. Given the history of Studebaker and ERISA generally, this potential problem must be addressed.

On the distribution end, the Department needs to make clear which entity is responsible for determining whether the participant is eligible to receive a distribution and ensuring that the distribution is processed properly, including any required spousal consent or qualified domestic relations order or loan repayment.

Related to both contributions and distribution is the issue of whether the assets of each employer should be segregated in the MEP. This could be achieved through separate accounting and could be helpful to plan administration if, for example, an employer is late with plan contributions.

AARP is concerned that the Department and the Internal Revenue Service do not have appropriate resources to adequately perform oversight through audits (or otherwise) of open MEPS. Without additional resources, we believe that compliance issues will increase, leading to an increase in the potential for bad actors, making participants and beneficiaries more vulnerable to losing their savings.

Clear and adequate reporting to employers, participants and beneficiaries, and the Department will best ensure that an open MEP system is working, and if not, how it can be improved. AARP urges all reporting to be provided on paper via the US mail, unless an affected party specifically requests electronic information delivery. Recent Pew and other reports have highlighted the growing switch to exclusive cell phone electronic information systems for most demographic groups, which largely is inappropriate for these types of detailed legal and financial information.

12. What types of entities would be interested in sponsoring open MEPS?

As discussed above, our understanding is that a variety of financial services firms are interested in offering types of MEPS provided they believe a reasonable level of profit would be achieved. Firms that primarily provide administrative services tend to charge per participant or percent of total asset fees. Firms that provide investment services generally offer many different types of investments, often for a wide range of fees. ERISA requires that the sponsor and administrator prudently select and monitor all investments and fees. Any DOL rule must clearly continue to

provide that the employer sponsor, or its designee – the adviser or administrator – must prudently select and monitor all investments and fees, which includes selecting and maintaining a reasonable fee structure.

Request for Hearing

AARP respectfully requests that the department hold a hearing on this proposed regulation before finalizing the rule in order to ensure that all relevant issues are fully evaluated, including the differing viewpoints as to the best way to structure these plans, as recognized by the department in the proposed regulation.

CONCLUSION

AARP appreciates the opportunity to share its views on these important issues to increase access to retirement plans for our members and all workers. We look forward to working with you and your colleagues to ensure the Department develops meaningful methods to increase access to retirement plans so that more individuals have the opportunity to save for a more secure and adequate retirement. If you have any questions, please feel free to contact me or Michele Varnhagen of our Government Affairs office at 202-434-3829 or at mvarnhagen@aarp.org.

Sincerely,



David Certner
Legislative Counsel and Legislative Policy Director

cc: Jeanne Klinefelter Wilson
Principal Deputy Assistant Secretary

Timothy D. Hauser
Deputy Assistant Secretary for National Office Operations

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Office Director, Office of Regulations and Interpretations

Attachment



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December 20, 2018

The Honorable Alexander Acosta
U.S. Department of Labor
200 Constitution Avenue, NW
Washington DC 20210

Re: Definition of Employer – Association Retirement Plans and other Multiple Employer Plans (RIN 1210-AB88)

Dear Secretary Acosta:

AARP commends the Department for starting to issue guidance to permit the development and operation of qualified “group” or “association” retirement plans, which hold promise as a way to expand retirement plan sponsorship and coverage for small employers and their employees and family members. AARP, with its nearly 38 million members in all 50 States, the District of Columbia, and the U.S. territories, is a nonpartisan, nonprofit, nationwide organization that helps empower people to choose how they live as they age, strengthens communities, and fights for the issues that matter most to families, such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse.

Policymakers have struggled for decades to find workable solutions for the millions of workers and their family members who want simple and effective ways to supplement their Social Security benefits by saving for retirement. Social Security is a successful system, in significant part, because nearly all workers are automatically enrolled and employee and employer payroll contributions are automatically withheld from paychecks. Social Security provides a base of retirement income and ideally will be supplemented by employer-paid or facilitated plans and individual savings. While large employers usually sponsor retirement plans, small employers and employers with more transient workforces have struggled to offer retirement coverage.

Numerous surveys of consumers have found that individuals prefer automatic enrollment in employer offered retirement savings plans.¹ Further, employees are 20

¹ <https://www.pewtrusts.org/en/about/news-room/opinion/2018/09/04/automatic-enrollment-for-retirement-savings-an-increasingly-available-option-with-a-large-impact>.

times more likely to save if they are offered an automatic payroll deduction option at work. The benefit of automatic enrollment is that it minimizes participant inaction and facilitates payroll deduction every pay period. Larger employers have found that sponsoring plans with automatic enrollment and payroll deduction is both popular with their employees and enables workers to accumulate significant savings to supplement Social Security at retirement.²

It has been a harder challenge to encourage most small employers to offer payroll deduction savings plans. Small employers are focused on running their businesses and do not usually have the time or expertise to sponsor a retirement plan. As the Department notes, cost and liability are related issues. Thus, the challenge is how to authorize retirement savings vehicles that will be relatively easy for small employers to offer, yet appropriate and adequate for their workers. It has long been hoped that permitting group or pooled arrangements would provide an easier option for smaller employers and good benefits for workers. The Department has decades of experience with pooled type plans for both retirement and health benefits. As AARP understands the history in this area, two of the largest problems have been: 1) unpaid employee and employer payroll contributions by employers, and 2) fraud and abuse of assets by pooled plan providers. Any final Department rule must provide standards to prevent these known types of abuses. The best way for pooled plans to offer successful retirement savings options to workers with minimal fraud and abuse is for DOL to establish clear and transparent rules and reporting for employers and the plans.

The Department's proposed rule takes the first step and clarifies the type of entity that may provide a group or association plan (a.k.a. multiple employer plan or MEP). AARP strongly supports the Department's requirement that the MEP act in a fiduciary capacity and financial service firms be prohibited from sponsoring a MEP. MEPs cannot be successful if the plan provider is self-interested. While the financial services industry is expert at selling financial services, they almost always face conflicts of interest in prudently determining which retirement investments and charges are appropriate. Most financial service firms do not act in a fiduciary capacity for key retirement plan functions.³

The Department should establish minimum standards for the type of firms that may sponsor a MEP, including, but not limited to:

- Minimum years of experience providing retirement benefits;
- Minimum key staff qualifications;
- Minimum capital reserves; and
- Minimum bonding and fiduciary liability insurance.

The Department is seeking comments on whether it should apply comparable standards between related and non-related or non-employer entities that seek to serve as a MEP

² https://pressroom.vanguard.com/nonindexed/HAS18_062018.pdf.

³ SEC Statista.com, 2018; FINRA Statistics, 2018; GAO, Pension Plans: Fulfilling Fiduciary Obligations Can Present Challenges for 401(k) Plan Sponsors, July, 2008.

that is “acting indirectly in the interest of an employer”. AARP has supported the Federal legislation that would permit open-MEPs.⁴ AARP has supported the broader conception for four reasons: 1) the legislation makes clear that the MEP must act as a fiduciary, including over investment selection; 2) the legislation makes clear that employers and employees cannot be charged unreasonable fees; 3) MEPs would be required to register with DOL and DOL is authorized to issue a model plan and any needed standards, and 4) modern technology and plan evolution has made these types of plans simpler and more transparent.

On the last point, 401(k) type plans need not be complex. Plans primarily need an integrated payroll deduction and recordkeeping system; an experienced fiduciary who can evaluate, negotiate and monitor an appropriate number and type of retirement investments for the participants and beneficiaries covered; one or more payment systems to pay out savings at retirement age; and a process for compliance with the law. There are many experienced individuals and firms that carry out these services. This is a well-developed market with a handful of firms that provide most of those services to employers. Provided the Department also establishes adequate disclosure documents, as long as employers, participants, and the Department can timely monitor MEP operations and redress any problems, AARP believes it is worth permitting firms to provide these needed retirement services for small employers and their employees.

Employer and MEP Responsibilities

Any final rules should provide clear rules for employer and group/pooled plan responsibilities. As the Department notes, ERISA clearly states that the fundamental responsibility of all employers is to prudently select and monitor their employee benefit plan. In order to assist small employers, the Department should provide a few clear parameters, a safe harbor or checklist of what may constitute prudent selection and monitoring.

AARP recommends that the Department encourage or require employers to:

- consider at least 3 plans;
- examine how long the plan has been in existence;
- review how many other employers and employees are actively enrolled;
- consider the investment options and all employer and participant fees; and
- any other standards the Department determines necessary.

The Department also should make clear that the employer must receive and review a report on plan operations and periodically assess employee satisfaction and complaints at least annually.

Further, to ensure the system is viable for employers, employees and plans, the Department needs to provide reasonable operating standards for the plans. The plans

⁴ See, the Retirement Enhancement and Savings Act, S. 2526, HR 5282.

should have a board with employer representatives as the Department has proposed, the plans also should have written rules on employee coverage, automatic enrollment, employee contribution levels, employer contributions, investment options, default contributions and investments, fees, loans and pre-retirement withdrawals, if any, and retirement age payment options.

The MEP should have fair rules that apply to all employers and participants and beneficiaries. Permitting MEPs to maintain multiple different rules for employers will increase complexity and costs for all. A pooled plan may offer one or a few options to employers, but the Department should discourage multiple and confusing plan options. Requiring pooled providers and employers to make multiple decisions both reduces employer interest and increases employer and pooled provider fiduciary responsibility. Most importantly, the Department should make clear to all parties that if the employer selects any investment options, the employer must act and be liable in a fiduciary capacity.

Ideally, the pooled plan will undertake these fundamental responsibilities that are required under ERISA. Again, the employer should prudently select and monitor the pooled plan and the pooled plan should be required to act as a fiduciary carrying out all remaining plan duties, and without any conflicts of interest. As the Department notes, Chambers of Commerce and payroll service firms may easily be able to offer pooled plans to their members and many already do so. However, one problem has been that financial service firms have offered financial incentives to select their firm's products. As a fiduciary, pooled plans may no longer accept such financial incentives.

Employer and Participant Disclosure

One of the most important and effective ways to make MEPs work successfully is to have clear public disclosure requirements. Pooled plans should be required in the final rule to provide a clear statement to employers and employees on employer duties and plan operations. Both employers and employees need to understand how the plan works and its key requirements. This information must be delivered to both parties reasonably in advance of joining the plan. In addition, participants and beneficiaries must be provided an annual statement of their earned benefits, investments, and fees charged. All documents, including the annual benefit statement, should be delivered via paper unless the person specifically requests electronic delivery. AARP and others have conducted several consumer surveys that have documented strong employee support for paper disclosures.⁵

⁵ Epsilon (June 2012). Channel Preferences Survey.

<https://web.archive.org/web/20130321145541/http://www.epsilon.com:80/news-and-events/press-releases/2012/consumer-survey-reveals-notable-difference-channel-preferences-m>;

InfoTrends in collaboration with the USPS Office of Inspector General. Report No. RARC-WP-13-009. (2013, May 21). What America Wants from the Postal Service: A Survey of Internet-Connected

Americans. https://www.uspsoig.gov/sites/default/files/document-library-files/2015/rarc-wp-13-009_0.pdf;

Perron, Rebecca, Ph.D., AARP (November 2012). Paper by Choice: People of All Ages Prefer to Receive Retirement Plan Information on Paper.

There also is growing research documenting that individuals do not carefully read and understand electronic materials and that electronic information is easily missed and negatively affects decision-making.⁶

The pooled plans also should be required to file an annual report on plan operations – a new form 5500 attachment or a new form – that details the number of enrolled employers, covered participants and beneficiaries, financial institutions and registered investment options, individual and total fees, and lists the names of each enrolled employer. The Department should configure its website so that employees can search and find their plan by employer or plan name. Either the pooled plan or the employer must be required to provide the annual reporting form and all other required disclosures to participants and beneficiaries. All pooled plans should be required to notify the Department of their operation. To encourage an easy and transparent system for small employers to offer group retirement plans, the Department should establish a public list of all pooled plans in a designated and clear location on its website that employers and employees can readily check.

The Department asked for comments on needed participant information. Participants and beneficiaries need to receive regular written information on:

- who is operating the plan,
- what are the key plan rules and requirements,
- what actions must the eligible participant or beneficiary undertake,
- what percent of salary will be deducted each pay period,
- when are employees eligible to join the plan,
- are there employer contributions and how much,
- what are the investment choices,
- what are each and the total amount of the fees being charged against their accounts,
- to whom do they ask questions or make complaints, and
- how and when may they receive their earned funds.

MEP Administration:

The Department also asked for advice on investment management, recordkeeping, and plan costs and expenses. The good news is that there are many firms that provide affordable recordkeeping and investment services and the market has been improving. Plan costs have dropped significantly, in large part due to the introduction of technology and public disclosure of all costs. Increasingly, the largest cost is administration and recordkeeping – largely the fixed costs of collecting employee data, transferring funds,

https://www.aarp.org/content/dam/aarp/research/surveys_statistics/consume/2012/Paper-by-Choice-People-of-all-ages-prefer-to-receive-retirement-plan-information-on-paper-AARP.pdf.

⁶ See for example, TIAA Institute, “Millennial Financial Literacy and Fin-Tech Use: Who Knows What in the Digital Era”, September 2018.

and monitoring and tracking all accounts. The median administrative and recordkeeping charge is 59 basis points.⁷

Investment management charges have declined, and in some cases significantly. There are many low cost retirement appropriate investments in the market. Cost effective high performing investments are available to individuals as well as groups. Individuals do not need large balances in order to purchase these well performing long-term investments; they do, however, need to have some investment knowledge. There are many retirement appropriate investments that charge 0-15 basis points (tenths of a percent of total investment). There also are mediocre investments that charge 100-400+ basis points. For this reason, it is critical that the MEP be required to act as a fiduciary in selecting investments, including the plan default investment for participants and beneficiaries who do not make an affirmative investment selection.

The financial services industry also sells many different types of products. It also will be a critical part of the MEP's fiduciary duties to prudently select only those products and services that are appropriate for covered participants and beneficiaries. Relatedly, every MEP will need to select a default investment for participants and beneficiaries who do not make any investment selection. The MEP should rely on the Department's qualified default investment alternative rules and prudently select an appropriate balanced or target date fund. Again, there are many excellent retirement appropriate investment products readily available, and that can be provided to MEP participants for less than 35 basis points. There are numerous studies documenting that most balanced funds and many target date funds perform well in the market over long periods of time. This information can be accessed easily by providers and employers, as there are many companies that provide regular administrative and investment firm and product ratings.

Further, any final rule should address the problems that have previously occurred in these types of plans. The Department should provide a clear rule that if an employer fails to pay employee or employer required contributions, the pooled plan will freeze the account, and notify the employer, employee and the Department. There is no reason to permit missed payments to accumulate and clear rules should timely prevent fraud and abuse and dashed expectations. Payroll deduction technology is very advanced and can quickly detect any missing elements.

Similarly, all pooled plan contributions should be invested in Federally or State licensed bank, insurance or mutual fund investments and if any contribution is more than 14 days late, the applicable financial institution should be required to report the missing payment to the plan, employer, participant and Department. All pooled plans should be required to post the financial institutions with whom they invest in their annual report as part of their registration filing, and on their websites and other relevant disclosures. The Department should set bonding and fiduciary liability requirements for pooled plans.

⁷ NEPC, Defined Contribution Plan and Fee Survey, 2017.

State Facilitated Open MEPs

State programs are a critical component to addressing the long-entrenched problem of 55 million Americans lacking a way to save for retirement using payroll deductions from their regular paycheck. To date, roughly 8 states have enacted laws that will extend access to more than 16.7 million workers. One of these states – Vermont – has chosen to establish a state facilitated open MEP and has already awarded the request for proposal to a private sector company that will operate the program. Additional states plan to introduce this model next year. The Department should make clear in its rule that states can continue to move forward with enacting and implementing state facilitated open MEPs.

Conclusion

AARP commends the Department for efforts to encourage a viable retirement savings option for small employers and their employees. The key to success is to provide clear and achievable rules for employers, and clear and protective rules for plan participants. Millions of employers and workers are benefiting from existing successful retirement savings plans. It is time we extend these successful practices – automatic enrollment, payroll deduction, prudent investments – to the uncovered workforce. AARP is happy to provide any needed additional assistance or information.

Sincerely,



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