December 21, 2018

Filed electronically at www.regulations.gov

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

RE: RIN 1210-AB88, Definition of "Employer" Under Section 3(5) of ERISA-Association Retirement Plans and Other Multiple-Employer Plans

Dear Sir or Madam:

The SPARK Institute writes in strong support of the Department of Labor's (the "Department") proposal to expand the employer groups and associations that may sponsor a single employee benefit plan under the Employee Retirement Income Security Act of 1974 ("ERISA"). We believe that making it easier for employers, particularly small employers, to join a single plan will result in increased retirement plan coverage and reduced cost. In addition, as detailed below, we recommend that the Department consider removing or relaxing some of the proposed conditions in the regulation so that the Department can fully implement the President's policy to "expand access to workplace retirement plans for American workers."[1]

The SPARK Institute represents the interests of a broad-based cross section of retirement plan service providers and investment managers, including banks, mutual fund companies, insurance companies, third party administrators, trade clearing firms, and benefits consultants. Collectively, our members serve approximately 95 million employer-sponsored plan participants.

I. Support for the Proposal

The SPARK Institute believes that retirement policy should make it easier – not harder – for small employers to offer retirement plans. We believe that greater availability of multiple employer plans ("MEPs") would help expand retirement plan coverage, especially for small businesses, because of the reduced costs and economies of scale that are made possible by MEPs. As the Department acknowledges, existing guidance has limited the ability of employers to pool together to offer their employees access to retirement plans at an affordable cost.

[1] Executive Order on Strengthening Retirement Security in America (August 31, 2018).

Under the proposal, a MEP that is sponsored by a "bona fide" association would be a single ERISA-covered plan instead of separate, individual plans with respect to each participating employer. This MEP would be considered an Association Retirement Plan, or "ARP." The sponsoring association would generally be responsible for ERISA's reporting, disclosure, and fiduciary obligations, while the participating employers would retain fiduciary responsibility for selecting and monitoring the ARP.

Among other requirements in the proposal, the employer members of a bona fide association must have a "commonality of interest." For this purpose, association members would have to (1) be in the same trade, industry, line of business, or profession; or (2) have a principal place of business within a region that does not exceed the boundaries of the same state or the same metropolitan area (even if the metropolitan area includes more than one state).

One of SPARK's key policy priorities is expanding coverage through use of "open" MEPs, which means a MEP that allows unrelated employers to join together in a single plan. The Department's proposal does not allow "open" MEPs as traditionally understood. Nonetheless, the proposal is an important step forward in increasing the availability of MEPs and we are happy to lend our support to the proposal.

II. Consider Expanding Proposal to Increase Effectiveness

The President's Executive Order made clear that the federal agencies should "revise or eliminate rules and regulations that impose unnecessary costs and burdens on businesses, especially small businesses, and that hinder formation of workplace retirement plans." The Order directed the Department to "clarify and expand the circumstances under which United States employers, especially small and mid-sized businesses, may sponsor or adopt a MEP."

The proposal includes a number of restrictions on the kinds of entities that can be the sponsor of the ARP and imposes conditions on the employers that can participate. In this regard, we urge the Department to consider eliminating or loosening requirements where consistent with ERISA and where consistent with protecting participants and beneficiaries. We make some suggestions below.

Before getting into specific suggestions, a few initial comments. First, while we appreciate that the ARP proposal was modeled on a similar rule[2] for Association Health Plans ("AHPs"), we would point out that the policy considerations are not the same. The Department's AHP rule allowed employers to join a large group health plan, rather than be subject to the rules for small group plans (or even individual coverage). This results in a different regulatory structure under the Affordable Care Act. Joining an ARP, on the other hand, has very little effect on the regulatory structure that applies to a retirement plan, as compared to a single plan. ERISA's fiduciary rules apply largely in the same way. In addition, since the ARP proposal is limited to defined contribution plans, there is no concern about a mismatch between promised

[2] 83 Fed. Reg. 28912 (June 12, 2018)

benefits and plan assets. Thus, many of the protections the Department put in place for AHPs simply are not necessary for ARPs. In fact, ERISA already includes special rules for multiple employer welfare plans ("MEWAs"), out of Congress' concern about the use of ERISA health plans to escape state insurance regulation.[3] These concerns simply do not apply in the retirement plan context.

Second, while we recognize that the Department has developed a long history of guidance on MEPs, it is very clear that ERISA itself says very little to constrain the Department. ERISA simply defines an employer to include a "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." Thus *any* person that acts indirectly in the interests of an employer in relation to an employee benefit plan is considered an employer. This *includes* a "group or association of employers acting for an employer in such a capacity," but is not limited to such a group or association. In short, the minimum needed for an entity to be considered an "employer" is that the entity (a) acts indirectly in the interest of an employer and (2) does so in relation to an employee benefit plan. With this background in mind, we urge the Department to consider the following changes to the proposal.

A financial institution should be able to sponsor an ARP. The proposal provides that the group or association may not be "a bank or trust company, insurance issuer, broker-dealer, or other similar financial services firm (including pension record keepers and third-party administrators), or owned or controlled by such an entity or any subsidiary or affiliate of such an entity, other than to the extent such an entity, subsidiary or affiliate participates in the group or association in its capacity as an employer member of the group or association." The preamble to the proposal acknowledges that in "a broad colloquial sense, it is possible to say that commercial service providers, such as banks, trust companies, insurance companies, and brokers, act 'indirectly in the interest of' their customers, but that does not convert every service provider into an ERISA-covered 'employer' of their customer's employees." While we agree that service providers are not automatically an "employer" with respect to the plan, there is nothing in ERISA that prohibits a service provider from *agreeing* to take on the role of a plan sponsor. And if a service provider agrees to act as plan sponsor then it is perfectly correct to say that the service provider is "acting indirectly" for the employer in relation to the plan. In fact, that's the most natural conclusion to draw from the plain language of the statute.

The preamble compares this situation to the AHP rule, but the situations are different. The AHP rule prevented health insurance companies from also acting as the plan sponsor of a health plan. Here the question is whether a financial services firm, simply because it is a financial service firm, can sponsor an ARP.

To the extent the Department is worried about conflicts of interest, ERISA addresses this through the prohibited transaction rules, which prohibit certain transaction with parties in interest and prevent fiduciaries from self-dealing. Congress contemplated that financial services firms

[3] ERISA § 514(b)(6).

would act as fiduciaries, subject to ERISA's prudence and prohibited transaction rules, and we see nothing in ERISA that prevents them from also acting as a plan sponsor.

The Department should eliminate or loosen the "commonality" requirement. Under the proposal, employers that participate in an ARP must either 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 a metropolitan area. The former rule is, essentially, already allowed under Department guidance, because trade associations already offer MEPs. The latter rule, requiring a principal place of business in the same region, is an expansion of current law. But we see nothing in ERISA that requires that a "group or association of employers acting for an employer" to be located in a single region. To the contrary, ERISA contemplates nationwide regulation of plans on a standard basis.[4] We also think that a nationwide ARP can provide as much protection – perhaps more – and better services to participants and beneficiary and can do so at a lower cost.

The Department should eliminate the "substantial business purpose" requirement. The proposal requires that an association that sponsors the ARP must have at least one substantial business purpose unrelated to offering and providing employee benefits to its employer members. But the proposal makes clear that offering MEP coverage can be the association's *primary* purpose and that the association need not actually be performing any other business purpose, only that it *could* perform such other purpose. Accordingly, we think this requirement is so easy to meet that it serves no real function and should be eliminated.

The Department should not mandate new disclosures. The Department seeks 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. Given the volume of required employee communications regarding the retirement plan, we believe that additional notice requirements are not needed since employers and participants already receive information about the plan through communications including SPDs, SMMs and 404a-5 participant disclosures. Further, plans already report detailed information on Form 5500. If the Department decides to require notice or reporting requirements, we ask the Department delay doing so until we have sufficient experience with ARPs to know what gaps exist in current disclosures. If there are gaps identified, we ask the Department to consider utilizing existing communications and provide model language that can be incorporated within those existing required communications. Finally, if notice requirements are needed, we ask that electronic delivery be the default mechanism.

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[4] Again, such a rule might make sense for an AHP, because health plans tend to be regional, reflecting that health care is delivered directly to an individual and thus plans tend to have a coverage area. But this is not the case with defined contribution retirement plans. Administration of the plan and custody of its assets can be anywhere in the U.S.; there is nothing "regional" about a 401(k) plan.

III. Retain Provision for Self-Employed Individuals

The proposal includes an important rule that would allow a working owner of a trade or business without common law employees to qualify as both an employer and an employee of the trade or business if certain requirements related to hours worked and the amount of wages or income are met. We applaud the Department for including this forward-looking provision to help ensure that self-employed individuals (including so-called gig workers) will have access to these new ARPs.

We would point out that legislation currently pending in Congress that would allow for open MEPs does not directly address this issue.[5] While we read the legislation as allowing self-employed individuals to join an open MEP (called a "Pooled Employer Plan" in the legislation) it will be important, if the legislation passes, for the Department to confirm this.

IV. Support Enactment of Open MEP Legislation

The SPARK Institute, and virtually every other stakeholder in the retirement industry, supports bipartisan, bicameral legislation currently pending in many bills to amend ERISA to provide for Pooled Employer Plans. Enactment of this legislation may address some of the limitations that the Department concludes are imposed by current law on the availability of truly open MEPs.

While we recognize that Department of Labor officials themselves do not advocate for enactment of legislation, agencies do provide technical input to Congress and advise the White House on whether to support legislation. We urge the Department to do all that it can to join the community in supporting open MEP legislation.

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[5] See, .e.g., Retirement Enhancement and Savings Act of 2018 (S. 2526, H.R. 5282); Family Savings Act of 2018 (H.R. 6757) (passed by House on September 27, 2018). This is a partial list of the many bipartisan bills.

The SPARK Institute appreciates the opportunity to provide these comments to the Department. If the Department has any questions or would like more information regarding this letter, please contact me or the SPARK Institute's outside counsel, Michael Hadley, Davis & Harman LLP (mlhadley@davis-harman.com or 202-347-2210).

Sincerely,

Tim Rouse
Executive Director