October 29, 2019

Employee Benefit Security Administration
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: RIN 1210-AB92, "Open MEPs" RFI

Ladies and Gentlemen:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to respond to the Department of Labor's request for information with regard to the expansion of retirement plan options. The Department is seeking comments on whether to amend its regulations to facilitate the sponsorship of open multiple employer plans ("MEPs") by persons acting indirectly in the interests of unrelated employers whose employees would receive benefits under such arrangements (called "open MEPs"). We strongly support the Department moving forward with such an amendment.

The Importance of Addressing Retirement Savings

SIFMA shares the Department's concern that American workers are not saving enough for retirement. We strongly believe individuals need to save more and make more educated choices with respect to their retirement savings. That goal requires a steady focus on education and disclosure, and greater partnership between employers, providers and employees. Financial literacy and general investment education need to become a part of the basic curriculum from grammar school through high school, including educating individuals about their likely retirement income needs, accessible methods of estimating those needs and the amount necessary to set aside monthly to meet those needs.

[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

Participating in an employer-sponsored retirement plan is often the easiest and most convenient way for workers to save. Expanding the availability of these plans is critical to ensuring that more Americans are adequately preparing for their retirement. According to the U.S. Bureau of Labor Statistics National Compensation Survey, 79% of all full-time workers participate in an employer-sponsored defined contribution or defined benefit plan when a plan was available.[2] Furthermore, according to an Investment Company Institute ("ICI") survey, nearly 5 out of ten individuals participating in a defined contribution plan at work indicated that they "probably would not be saving for retirement" if they did not have access to an employer-sponsored plan.[3]

Many employers offer automatic enrollment, tax-deferred payroll deductions and matching contributions, all of which encourage employees to build their retirement nest eggs. There is no question that employers recognize that offering a plan helps attract and retain talent. Small businesses universally list having a retirement plan as second in importance only to offering health insurance.[4] However, too many businesses—and in particular, small businesses—face significant barriers to establishing and maintaining retirement plans for their employees, and fewer than 50% of workers at an employer with under 50 employees have access to a plan at work. Compared with 88% of workers at an employer with more than 500 employees with access to an employer-sponsored plan, there is a significant access gap among smaller employers. Employers often cite the costs of setting up a plan, the confusing regulatory landscape, and the very real legal risks inherent in sponsoring a plan, including the potential for expensive and time-consuming litigation. Allowing employers to join a pooled arrangement addresses all of these issues. Accordingly, it is incumbent on the Department to make sure that the pool of potential arrangments for small and medium sized employers be as broad as possible.

While the Department recently finalized a regulation to allow for certain unconnected business owners to pool their assets to create a single plan, we believe it can be broadened to expand access for more small businesses to help more employees save for retirement. We appreciate the Department issuing this Request for Information, and include responses below to those questions for which we have helpful input to provide.

I. Opportunity to Interpret Definition of Employer

In question 1, the DOL asks about whether they should expressly permit financial institutions to maintain an open MEP. We believe the Department should interpret the definition of employer to clearly permit financial institutions to maintain an open MEP.

Financial institutions currently service the retirement marketplace well, with longstanding and well proven safeguards to ensure that retirement savings remain safe and secure. As the Employee Retirement Income Security Act ("ERISA") and the Internal Revenue Code have been interpreted consistently over the last 44 years, banks, insurers and broker-dealers have been approved and recognized providers of retirement services. They are highly regulated by the

[2] U.S. Bureau of Labor Statistics, National Compensation Survey: Employee Benefits in the U.S., March 2018. Retrieved from https://www.bls.gov/ncs/ebs/benefits/2018/ownership/private/table02a.pdf

[3] Holden, Sarah, Daniel Schrass, Jason Seligman, and Michael Bogdan. 2019. "American Views on Defined Contribution Plan Saving, 2018." ICI Research Report (February). Available at www.ici.org/pdf/ppr_19_dc_plan_saving.pdf.

[4] Pew Charitable Trusts: http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/09/business-owners-perspectives-on-workplace-retirement-plans-and-state-proposals-to-boost-savings

federal and state securities, banking and insurance regulators. In addition, they are proven efficient and effective providers of services to plans. They are best positioned to provide such services to open MEPs.

In question 2, the DOL asks whether a bank, insurance company, broker-dealer and other similar financial services firms including pension recordkeepers and third-party administrators ("TPAs") (all termed "Commercial Entities" per this RFI) should all be recognized as a MEP sponsor.[5] We believe that all Commercial Entities, as well as all non-bank custodians that qualify under the Code to offer IRAs, should be appropriate to also offer an open MEP. With a goal of expanding coverage by increasing the availability of options through the creation of open MEPs, we would like the Department to view the expansion in the broadest means possible, while still ensuring protection of individuals who join these particular plans.

While we believe a broad definition of employer for these purposes is the best way to meaningfully increase retirement plan access and security, we believe that certain constraints are necessary that focus on protections to prevent vulnerability from allowing just anyone to set up an open MEP. Those parameters should include: bonding requirements and a limitation to regulated financial institutions. These parameters would facilitate the broadest expansion while retaining important protections for both employers joining an open MEP and the participating employees.

II. Conflicts of Interest

In question 3, the DOL asks about what conflicts of interest the Commercial Entity, affiliates or related parties would likely have with respect to the plan and its participants.

While there is not necessarily a conflict, if there is such a conflict, financial institutions disclose and work to mitigate those conflicts where appropriate as required under existing regulations, including banking, securities and insurance regulations, as well as the existing ERISA/IRC PTE framework today.

Financial institutions regularly review their conflicts and look to disclose and/or mitigate as appropriate. In fact, under the recently finalized Securities and Exchange Commission ("SEC") Regulation Best Interest, firms are currently reviewing their overall conflicts of interest and working to mitigate or eliminate such conflicts where appropriate. While it is not completely on point for the creation of open MEPs, it is one standard by which one could address conflicts that might arise under these arrangements.

It is also worth noting that participating employers retain fiduciary responsibility for the prudent selection of the MEP provider, and they will receive various disclosure information which they will be able to review with regard to conflicts. If the DOL is unsure about the disclosure that might be provided a potential MEP provider, the DOL could consider expanding Sec. 408(b)(2) or Sec. 404(c)-5 disclosure as part of their rule.

[5] The definition of "Commercial Entities" should also specifically include Registered Investment Advisors.

III. Suggested New Definition

In question 5, the Department asks how the current regulation could be reformulated to facilitate open MEPs. We believe the Department should propose a regulation that defines "acting in the interest of an employer" to include:

- the act of providing employees with an opportunity to participate in an open MEP
- sponsoring such an open MEP
- providing financial education, and
- engaging in the investment, benefit payment, contribution processing, tax withholding, and other related functions

Such a regulation would provide significantly more opportunities for small business owners to establish and maintain retirement plans for their employees.

The heart of expanding access to MEPs for small business owners under ERISA has been to determine what types of entities may be considered an "employer" for purposes of sponsoring a pooled arrangement. Under ERISA section 3(5), the term "employer" means: "any person acting directly as an employer, or *indirectly in the interest of an employer,* in relation to an employee benefit plans….".[6] ERISA does not constrain what it means to be acting "indirectly in the interest of an employer, in relation to an employee benefit plan." That lack of limitation could and should as a policy matter cause the Department to interpret ERISA section 3(5) expansively. The plain language of the statute does not limit "indirectly as an employer" to professional employer organizations ("PEOs"), or to any particular function, such as payroll processing. The Department itself notes in the preamble that the relevant court cases do not limit the phrase acting "indirectly as an employer."[7]

In discussing the scope of the Department's authority under section 3(5) in the recently finalized rule with regard to Association Retirement Plans, the Department stated that "neither the Department's previous advisory opinions, nor relevant court cases, foreclose DOL from adopting a more flexible test in a regulation, or from departing from particular factors previously used in determining whether a group or association can be treated as acting as an "employer" or "indirectly in the interest of an employer" for purposes of the statutory definition.[8]

The preamble to that regulation continues: "Rather, the terms 'employer' and 'indirectly in the interest of an employer' are ambiguous as applied to a group or association in the context of ERISA section 3(5), and the statute does not specifically refer to or impose the 'commonality' test on the determination of whether a group or association acts as the 'employer' sponsor of an ERISA-covered plan within the scope of ERISA section 3(5)."[9]

We agree, and urge the DOL to use the regulatory process to expand the usefulness of MEPs.[10]

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[6] 29 U.S.C. 1002(5); ERISA section 3(5)
[7] 83 Federal Register 53534 (October 23, 2018)
[8] 83 FR 28914, June 21, 2018.
[9] Id.
[10] In Executive Order 13847, the President declared it the policy of the Executive Branch to expand access to multiple employer plans as an efficient way to reduce costs and "encourage more plan formation and broader availability of workplace retirement plans, especially among small employers."[10] The Department has the opportunity to encourage more plan formation and broader

IV. Intersection with Other Rules

In question 7, the Department asks about whether the various qualification requirements under section 401(a) of the Code (e.g. nondiscrimination , exclusive benefit, minimum participation, minimum coverage, and top-heavy requirements) should be reviewed, and whether the cost and complexity of such requirements would be a hinderance to establishing and maintaining an open MEP.

We do not believe that continued application of these existing qualification requirements would be a significant barrier since those organizations already follow Sec. 401(a) of the Code to provide existing closed MEPs. SIFMA believes that conformity between the rules and requirements under existing closed MEPs today and the operation of the proposed open MEPs would reduce potential confusion while also providing important protections for participating employers and individuals. As the financial institutions choose to implement and offer open MEPs, the consistency would improve and ensure compliance by allowing those working on compliance and operation to follow one set of rules. Further, these rules provide various important protections to the participants in the plans that we would like to see apply to participants under open MEPs as well.

While the broader MEP rules should be applied uniformly, at the same time, the rules with regard to nondiscrimination, exclusive benefit, minimum participation, minimum coverage and top-heavy requirements should apply at the individual employer level to allow each employer to be treated as an independent employer not tied to other independent employers. We would want it to be clear that organizations and financial firms establishing an open MEP should continue to apply these rules directly to each individual employer and not across the entire MEP, as there could be businesses with significant differences that would compromise the qualification if applied across all participating firms. We would also request confirmation that the Employee Plans Compliance Resolution System ("EPCRS") would be handled at the individual employer level since that it is at that level where the problem needing to be addressed would arise.

Further, consistent with how today's existing closed MEPs operate, SIFMA believes plan audits should be managed at the MEP level to ensure that costs remain low.

A preferred approach to further enhance the attractiveness of MEP participation by small employers, the Department may want to consider providing relief from non-discrimination testing for small employers. There are some small employers who may not see enough economic and cost benefit by being in a MEP if they still need to make ~~a~~ safe harbor contributions into the plan. The Department should work with the IRS to provide relief from non-discrimination testing for small employers by creating a new safe harbor. The new safe harbor should be based on universal employee eligibility for the plan and full and immediate vesting of all contributions, rather than requiring minimum contributions to be made by the employer.

availability of workplace retirement plans by expanding this regulation to include the provision of retirement plan coverage. Executive Order 13847 (83 FR 45321) (Sept. 6, 2018)

In question 8, regarding other rules the Department should consider in connection with a rulemaking to expand open MEPs, financial institutions establishing an open MEP (and participating employers) would need relief from the "one bad apple" rule. The Internal Revenue Service ("IRS") has proposed relief from this rule, and SIFMA has filed a letter of support for IRS moving forward with that proposed change.[11]

Conclusion

We are encouraged by this Request for Information from the Department to take a broader look at the options for expanding access to retirement plans, particularly through the expansion of the availability of multiple employer plans. The Department has the ability to interpret expansively what is deemed to be "indirectly in the interest of the employer" to include pooled employer plans where the employers are unaffiliated and are not linked by either industry or geography. In SIFMA's view, to be any more limiting would undermine efforts to expand retirement savings programs to the workers that do not currently have access to an employer-based plan.

Thank you for the opportunity to provide input. If you have any questions or would like to discuss these comments further, please contact me at (202) 962-7329.

Sincerely,

Lisa J. Bleier
Managing Director

[11] See letter filed with IRS with regard to RIN 1545-BO97, published in 84 Federal Register 128 (July 3, 2019).