DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2510

RIN 1210–AB88

Definition of "Employer" Under Section 3(5) of ERISA—Association Retirement Plans and Other Multiple-Employer Plans

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Proposed rule.

SUMMARY: The Department of Labor proposes a regulation under title 29 of the Code of Federal Regulations to expand access to affordable quality retirement saving options by clarifying the circumstances under which an employer group or association or a professional employer organization (PEO) may sponsor a workplace retirement plan. In particular, the proposed regulation clarifies that employer groups or associations and PEOs can, when satisfying certain criteria, constitute ''employers'' within the meaning of section 3(5) of ERISA for purposes of establishing or maintaining an individual account ''employee pension benefit plan'' within the meaning of ERISA section 3(2). As an ''employer,'' a group or association can sponsor a defined contribution retirement plan for its members, as can a PEO sponsor a plan for client employers (collectively referred to as ''MEPs'' unless otherwise specified). The proposed regulation would allow different businesses to join a MEP, either through a group or association or through a PEO. The proposal would also permit certain working owners without employees to participate in a MEP sponsored by a group or association. The proposal would primarily affect groups or associations of employers, PEOs, plan participants, and plan beneficiaries. The proposal would not affect whether groups, associations, or PEOs assume joint-employment relationships with member-employers or client employers. But the proposal may affect banks, insurance companies, securities broker-dealers, record keepers, and other commercial enterprises that provide retirement-plan products and services.

DATES: Comments are due by December 24, 2018.

ADDRESSES: You may submit written comments, identified by RIN 1210–AB88, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N–5655, U.S. Department of Labor, 200 Constitution Ave. NW, Washington, DC 20210, Attention: Definition of Employer—MEPs RIN 1210–AB88.

Instructions: All submissions must include the agency name and Regulatory Identifier Number (RIN) for this rulemaking. If you submit comments electronically, do not submit paper copies. Comments will be available to the public, without charge, online at *http://www.regulations.gov* and *http://www.dol.gov/agencies/ebsa* and at the Public Disclosure Room, Employee Benefits Security Administration, Suite N–1513, 200 Constitution Ave., NW, Washington, DC, 20210.

Warning: Do not include any personally identifiable or confidential business information that you do not want publicly disclosed. Comments are public records posted on the internet as received and can be retrieved by most internet search engines.

FOR FURTHER INFORMATION CONTACT: Mara S. Blumenthal, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693–8500. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. Overview and Purpose of Regulatory Action

Expanding access to workplace retirement plans is critical to helping more American workers financially prepare to retire. Approximately 38 million private-sector employees in the United States do not have access to a retirement plan through their employers.[1] According to the U.S. Bureau of Labor Statistics, 23 percent of all private-sector, full-time workers have no access to a workplace retirement plan.[2] The percentage of private-sector workers without access to a workplace retirement plan increases to 32 percent when part-time workers are included.[3]

Small businesses are less likely to offer retirement benefits. In 2018, approximately 85 percent of workers at private-sector establishments with 100 or more workers were offered a retirement plan. In contrast, only 53 percent of workers at private-sector establishments with fewer than 100 workers had access to such plans.[4] Contingent or temporary workers are less likely to have access to a workplace retirement plan than those who are traditionally employed.[5] Access to an employment-based retirement plan is critical to the financial security of aging workers. Among workers who do not have access to a workplace retirement plan, only about 13 percent regularly contribute to individual retirement accounts, commonly called IRAs.[6]

Regulatory complexity discourages employers—especially small businesses—from offering workplace retirement plans for their employees. Establishing and maintaining a plan is expensive for small businesses. A survey by the Pew Charitable Trusts found that only 53 percent of small-to mid-sized businesses offer a retirement plan; 37 percent of those not offering a plan cited cost as a reason.[7] Employers

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[1] This number was estimated by the U.S. Department of Labor's Employee Benefits Security Administration using statistics from the U.S. Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in the United States, March 2018* (*www.bls.gov/ncs/ebs/benefits/2018/employee-benefits-in-the-united-states-march-2018.pdf*). According to Table 2 (entitled Retirement Benefits: Access, Participation and Take-up rates, Private Industry Workers) of this survey, approximately 68% of private-sector industry workers have access to retirement benefits through their employers in 2018. According to Appendix Table 2, the survey represents approximately 118.1 million workers in 2018. Thus, the number of private industry workers without access to retirement plans through their employers is estimated to be approximately 38 million ((100% − 68%) × 118.1 million).

[2] *U.S. Bureau of Labor Statistics, National Compensation Survey: Employee Benefits in the United States, March 2018 at Table 2 (entitled Retirement Benefits: Access, Participation and Take-up rates, Private Industry Workers). The survey is available at* (*www.bls.gov/ncs/ebs/benefits/2018/employee-benefits-in-the-united-states-march-2018.pdf*).

[3] *Id.*

[4] *Id.*

[5] *See* U.S. Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements—May 2017. See also* Copeland, *Employee Benefit Research Institute, Employment-Based Retirement Plan Participation: Geographic Differences and Trends, 2013,* (October 2014); U.S. Government Accountability Office, *Contingent Workforce: Size, Characteristics, Earnings, and Benefits,* April 20, 2015; U.S. Gov't Accountability Office, GAO–15–566, RETIREMENT SECURITY—*Federal Action Could Help State Efforts to Expand Private Sector Coverage* (Sept. 2015) (*www.gao.gov/assets/680/672419.pdf*).

[6] The Department calculated this using *Survey of Income and Program Participation 2008 Panel Data Waves 10 and 11.*

[7] The Pew Charitable Trusts, *Employer Barriers to and Motivations for Offering Retirement Benefits,* (June 2017) (*http://www.pewtrusts.org/-/media/assets/2017/09/employer_barriers_to_and_motivations.pdf*) (''Most commonly, employers without plans said that starting a retirement plan is too expensive to set up (37 percent). Another 22 percent cited a lack of administrative resources. In focus groups, some business representatives said their mix of workers—especially if they included low-wage or short-term employees—translated into limited employee interest in or demand for retirement benefits. But in the survey, only 17 percent cited lack of employee interest as the main reason they did not offer a plan.'').

often cite annual reporting costs and exposure to potential fiduciary liability as major impediments to plan sponsorship.[8]

MEPs thus have the potential to broaden the availability of workplace retirement plans, especially among small employers.[9] MEPs are a structure under which different businesses can adopt a single retirement plan. Pooling resources in this way can be an efficient way not only to reduce costs but also to encourage more plan formation. For example, investment companies often charge lower fund fees for plans with greater asset accumulations. And because MEPs facilitate the pooling of plan participants and assets in one large plan, rather than many small plans, they enable small businesses to give their employees access to the same low-cost funds as large employers offer.

For a small business, in particular, a MEP may present an attractive alternative to taking on the responsibilities of sponsoring or administering its own plan. The MEP structure can reduce the employer's cost of sponsoring a benefit plan and effectively transfer substantial legal risk to professional fiduciaries responsible for the management of the plan. Although employers would retain some fiduciary responsibility for choosing and monitoring the arrangement and forwarding required contributions to the MEP, the employer could keep more of its day-to-day focus on managing its business, rather than on its plan.

Under the proposal here, an employer generally would be required to execute a participation agreement or similar instrument that lays out the rights and obligations of the MEP sponsor and the participating employer before participating. But these employers would not be viewed as sponsoring their own separate, individual plans under ERISA. Rather, the MEP, if meeting the conditions of the proposal below, would constitute a single employee benefit plan for purposes of title I of ERISA. Consequently, the MEP sponsor —and not the participating employers—would generally be responsible, as plan administrator, for compliance with the requirements of title I of ERISA, including reporting, disclosure, and fiduciary obligations. This is so because the individual employers would not each have to act as plan administrators under ERISA section 3(16) or as named fiduciaries under section 402 of ERISA.

Under the Department's proposal, an employer group or association or PEO would be acting as the ''employer'' sponsoring the plan within the meaning of section 3(5) of ERISA. This means that, typically, the employer group or association or PEO would act as a plan administrator and named fiduciary and, thus, would assume most fiduciary responsibilities. A MEP under this proposal would be subject to all of the ERISA provisions applicable to defined contribution retirement plans, including the fiduciary responsibility and prohibited transaction provisions in title I of ERISA. As a plan that is maintained by more than one employer, the MEP would have to satisfy the requirements of section 210 (a) of ERISA.

B. The Need for Reform

Workers have limited tax-favored options to save for retirement beyond workplace plans. IRAs are not comparable to workplace retirement savings options. As compared to IRAs, the advantages to employees of ERISA-protected retirement plans include: (1) Higher contribution limits; (2) generally lower investment management fees as the size of plan assets increases; (3) a well-established uniform regulatory structure with important consumer protections, including fiduciary obligations, recordkeeping and disclosure requirements, legal accountability provisions, and spousal protections; (4) automatic enrollment; and (5) stronger protections from creditors. At the same time, workplace retirement plans provide employers with choice among plan features and the flexibility to tailor retirement plans that meet their business and employment needs.

Although many MEPs already exist, there are reasons why they are not more widely available. The Department knows from the ''association health plan'' rulemaking process (AHP Rule), for instance, that many employer groups and associations already exist and have an expressed interest in providing access to employee benefits to their members. We understand that several of these groups and associations view the Department's current interpretive position in subregulatory interpretive rulings, regarding the extent to which these entities may be considered ''employers'' to sponsor a benefit plan, as overly restrictive. Certain groups and associations may view the current position in subregulatory interpretive rulings as an undue impediment to greater sponsorship of retirement plans, in the same way that certain groups and associations viewed the Department's guidance for health plans prior to the AHP Rule. Likewise, we understand an active PEO industry already exists and that its members, much like employer groups and associations, offer or would like to offer MEPs to their clients. At least some PEOs may be discouraged from doing so by a lack of clear standards, to the detriment of employers, especially small employers.

Federal policy makers across the spectrum are increasingly focusing on the potential for MEPs to help America's workers. The Department is cognizant of Congress's efforts to promote MEPs through legislation.[10] The President, too, has declared it the policy of the Executive Branch to ''[e]xpand[ ] access to multiple employer plans . . . [as] an efficient way to reduce administrative costs of retirement plan establishment and maintenance and [to] encourage more plan formation and broader availability of workplace retirement plans, especially among small employers.'' [11]

[8] *See* U.S. Gov't Accountability Office, GAO–12–326, *Private Pensions Better Agency Coordination Could Help Small Employers Address Challenges to Plan Sponsorship* (March 2012) 18–19, *https://www.gao.gov/products/GAO-12-326.*

[9] Two other types of pension arrangements share features of MEPs, but are not the focus of this proposal. A ''multiemployer plan'' as defined in ERISA section 3(37) is a plan to which more than one employer is required to contribute and which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer. There are also Pre-approved Plans, which are plans that are made available by providers for adoption by employers. See Rev. Proc. 2017–41, 2017–29 IRB 92. A plan that uses a Pre-approved Plan document may either be a single-employer plan or a MEP. With respect to single-employer Pre-approved Plans, providers often offer services relating to central administration and may pool the assets of different plans into a central investment fund.

[10] In both the 114th and 115th Congress, a number of mostly bipartisan legislative proposals have been introduced encouraging the creation of MEPs. In the 115th Congress alone, the following eight bills have been introduced: H.R. 854, the ''Retirement Security for American Workers Act,'' sponsored by Rep. Vern Buchanan and five bipartisan cosponsors on Feb. 3, 2017, its Senate companion bill, S. 1383, the ''Retirement Security Act,'' sponsored by Sens. Susan Collins (R–ME) and Bill Nelson (D–FL) on June 6, 2017; .H.R. 4523, the ''Automatic Retirement Act of 2017,'' sponsored by Rep. Richard Neal (D–MA) on Dec. 8, 2017; H.R. 4637, the ''Small Businesses Add Value Act of 2017'' (SAVE Act), sponsored by Reps. Ron Kind (D–WI) and Dave Reichert (R–WA) on Dec. 13, 2017; S. 2526/H.R. 5282, the bipartisan bill, the ''Retirement Enhancement and Savings Act of 2018'' (RESA), sponsored, respectively by Senate Finance Committee Chairman Orrin Hatch (R–UT) and Ranking Member Ron Wyden (D–OR) on March 9, 2018, and Rep. Mike Kelly (R–PA) and 76 cosponsors (as of Sept. 19) on March 14, 2018; S. 3219, The ''Small Business Employees Retirement Enhancement Act, '' introduced by Sens. Tom Cotton (R–AR), Todd Young (R–IN), Heidi Heitkamp (D–ND), and Cory Booker (D–NJ) on July 17, 2018; and H.R. 6757, the ''Family Savings Act 2018,'' introduced on Sept. 10, 2018, by Rep. Rodney Davis (R–IL) and 29 cosponsors . H.R. 6757 was passed by the House of Representatives on Sept. 27, 2018, and referred to the Senate Finance Committee on Sept. 28, 2018, for consideration.

[11] Executive Order 13847 (83 FR 45321) (Sept. 6, 2018).

The Department's proposal differs in significant ways from several legislative proposals introduced in Congress. For one thing, the Department's proposal is more limited because it relies solely on the Department's authority to promulgate regulations administering title I of ERISA. Unlike the Department, Congress has authority to make statutory changes to ERISA and other areas of law that govern retirement savings, such as the Internal Revenue Code (Code).

The Department does, however, have authority to interpret the statutes it administers, and it believes that a regulation clarifying the meaning of the statutory term ''employer,'' 29 U.S.C. 1003(a)(1), will ensure that statutory term is a clear legal standard for the use of MEPs under title I of ERISA. The Department had previously issued subregulatory guidance interpreting this provision that took a narrow view of the circumstances under which a group or association of employers could band together to act ''in the interest of'' employer members in relation to the offering of retirement savings plans. By clarifying its interpretation of the statutory language, the Department believes it could improve access to employer-sponsored retirement savings plans in America.

The Department recently promulgated a similar rule to expand access to more affordable, quality healthcare by enhancing the ability of employers to band together to provide health benefits through a single ERISA-covered plan, called an ''association health plan'' (AHP). That regulation, the AHP Rule, issued on June 21, 2018, explains how employers acting together to provide such health benefits may meet the definition of the term ''employer'' in ERISA section 3(5).[12] The AHP Rule sets forth several criteria under which groups or associations of employers may establish an ERISA-covered multiple employer group health plan. Several commenters on the AHP proposed rule encouraged the Department to bring MEPs within the sweep of that rule or a new rule. In the AHP Rule, the Department said it would consider those comments in the retirement plan context.[13]

On August 31, 2018, President Trump issued Executive Order 13847, ''Strengthening Retirement Security in America,'' (Executive Order), which states that ''[i]t shall be the policy of the Federal Government to expand access to workplace retirement plans for American workers.'' The Executive Order directed the Secretary of Labor to examine policies that would: (1) Clarify and expand the circumstances under which U.S. employers, especially small and mid-sized businesses, may sponsor or adopt a MEP as a workplace retirement savings option for their employees, subject to appropriate safeguards; and (2) increase retirement security for part-time workers, sole proprietors, working owners, and other entrepreneurial workers with non-traditional employer-employee relationships by expanding their access to workplace retirement savings plans, including MEPs. The Executive Order further directed, to the extent consistent with applicable law and the policy of the Executive Order, that the Department consider within 180 days of the date of the Executive Order whether to issue a notice of proposed rulemaking, other guidance, or both, that would clarify when a group or association of employers or other appropriate business or organization could be an ''employer'' within the meaning of ERISA section 3(5).

The Department reviewed current policies regarding MEPs and concluded that it should clarify through regulation that an employer group or association or a PEO that meets certain conditions may sponsor a single MEP under title I of ERISA (as opposed to providing an arrangement that constitutes multiple retirement plans). The Department, therefore, is proposing to issue a regulation interpreting the term ''employer'' for purposes of ERISA section 3(5). This proposed rule would supersede subregulatory interpretive rulings under ERISA section 3(5), and it would establish more flexible standards and criteria for sponsorship of these MEPs than currently articulated in that prior guidance. This proposed rule is intended to facilitate the adoption and administration of MEPs and to expand access to workplace retirement plans. The Department especially seeks to expand such access for employees of small employers and for certain self-employed individuals. The Department's proposal would not impact existing auto-enrollment options and other features that make 401(k) plans attractive for employers.

As explained more fully in the regulatory impact analysis below, the Department also seeks to level the playing field for small-business employees by permitting them to have access to the lowest-cost funds, often reserved for employees in large-asset plans. Small differences in fund fees can translate into enormous differences in retirement savings over a career.[14] The GAO, for instance, has determined that ''participants in smaller plans typically pay higher fees than participants in larger plans.'' [15] GAO has emphasized the need for small businesses ''to understand plan fees in order to help participants secure adequate retirement savings.'' [16]

The Department acknowledges that the term ''multiple employer plan'' is used to refer to different kinds of employee-benefit arrangements. This proposal, however, addresses only two kinds of arrangements: Sponsorship of a MEP plan by either a group or association of employers or by a PEO. The proposed regulation sets forth the circumstances in which a group or association or a PEO is appropriately treated, within the meaning of ERISA section 3(5), as an ''employer'' in sponsoring an employee benefit plan for participating employers and their employees. The Department's proposal also would not involve defined benefit plans, in part, because the Department's view is that such plans raise different policy considerations. In addition, according to the Government Accountability Office, sponsorship of MEPs ''seems to be following the general trend away from traditional benefit plans and towards defined contribution plans.'' [17] Therefore, the proposed rule would apply solely to defined contribution plans.

The Department solicits public comment on whether the Department should address, by regulation or otherwise, whether there are other types of entities that should be treated as an ''employer,'' within the meaning of

[12] 83 FR 28912 (June 21, 2018).

[13] *Id.* at 28964, n.10 (The ''Department will consider comments submitted in connection with this rule as a part of its evaluation of MEP issues in the retirement plan and other welfare benefit plan contexts.'')

[14] Assume an employee with 35 years until retirement and a current 401(k) account balance of $25,000. If returns on investments over the next 35 years average 7 percent and fees and expenses reduce average returns on the account by 0.5 percent, the account balance will grow to $227,000 at retirement, even if there are no further contributions to the account. If fees and expenses are 1.5 percent, however, the account balance will grow to only $163,000. The 1 percent difference in fees and expenses would reduce the account balance at retirement by 28 percent. *https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/a-look-at-401k-plan-fees.pdf.*

[15] GAO–12–325, *Increased Educational Outreach and Broader Oversight May Help Reduce Plan Fees* (April 2012) at 21, *https://www.gao.gov/products/GAO-12-325.*

[16] GAO Testimony before the Senate Comm. on Health, Education, Labor and Pensions, Statement of Charles A. Jeszeck, GAO Director of Education, Workforce and Income Security, GAO–13–748T (July 16, 2013) at 16, *https://www.gao.gov/assets/660/655889.pdf.*

[17] GAO–18–111SP, *The Nation's Retirement System: A Comprehensive Re-evaluation Is Needed to Better Promote Future Retirement Security* (Oct. 2017); 2012 GAO report, at 10, *https://www.gao.gov/products/GAO-18-111SP.*

ERISA section 3(5), for purposes of sponsoring a MEP. *See* Section E, below, entitled ''Request for Public Comments.''

The Department also notes that nothing in the proposed rule is intended to suggest that participating in a MEP sponsored either by a bona fide group or association of employers or by a PEO gives rise to joint employer status under any federal or State law, rule, or regulation. The proposal also should not be read to indicate that a business that contracts with individuals as independent contractors becomes the employer of the independent contractor merely by participating in a MEP with those independent contractors, who would participate as working owners, if applicable, or promoting participation in a MEP to those independent contractors, as working owners. The Department asks for comment as to whether concerns about joint employment issues should be addressed further as part of any final rule.

C. Legal Background

1. Statutory Definitions

ERISA section 4 governs the reach of ERISA and, accordingly, of the Department's authority over benefit plans. ERISA applies not to every benefit plan but only to an ''employee benefit plan'' sponsored ''by any employer.'' ERISA section 4(a)(1); 29 U.S.C. 1003(a)(1). The provision reads in relevant part: ERISA ''shall apply to any employee benefit plan if it is established or maintained by any employer.'' [18] ERISA defines ''employee pension benefit plan'' to include ''any plan, fund, or program . . . established or maintained by an employer . . . to the extent that by its express terms or as a result of surrounding circumstances'' it provides retirement income to employees or the deferral of such income. The term ''employer'' is again essential to recognizing an ''employee pension benefit plan'' within the meaning of ERISA. Thus, a prerequisite of ERISA coverage is that the retirement plan must be established or maintained by an ''employer.''

ERISA section 3(5) defines the term ''employer.'' ERISA section 3(5); 29 U.S.C. 1002(5). ERISA's definitional provision reads in full:

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 plan; and includes a group or association of employers acting for an employer in such capacity.

When Congress enacted ERISA in 1974, it copied this important definition from the 1958 Welfare and Pension Plans Disclosure Act. Public Law 85–836, sec. 3(a)(4), 72 Stat. 997, 998 (1958).

But ERISA does not explain what it means for an entity to act ''directly as an employer'' or ''indirectly in the interest of an employer, in relation to an employee benefit plan.'' Nor does the statute explain what is meant by a ''group or association of employers.'' In short, these ambiguous statutory terms are not themselves defined. As one court has recognized, the ''problem lies, obviously enough, in determining what is meant by these oblique definitions of employer.'' *Meredith* v. *Time Ins. Co.,* 980 F.2d 352, 356 (5th Cir. 1993). The statutory lacunae have proven problematic for some courts. They ''have found the phrase 'act . . . indirectly in the interest of an employer' difficult to interpret.'' *Mass. Laborers' Health & Welfare Fund* v. *Starrett Paving Corp.,* 845 F.2d 23, 24 (1st Cir. 1988); *accord Greenblatt* v. *Delta Plumbing & Heating Corp.,* 68 F.3d 561, 575 (2d Cir. 1995). So too is there statutory ambiguity with the term ''group or association of employers.'' Because ERISA ''does not define th[at] term,'' this ''void injects ambiguity into the statute.'' *MD Physicians & Assocs.* v. *State Bd. of Ind.,* 957 F.2d 178, 184 (5th Cir. 1992). Although ERISA contains a definition of ''employer,'' the important terms used within that definition are unexplained.

In light of all this, and consistent with longstanding principles of administrative law, the Department is best-positioned to address this statutory ambiguity by exercising its discretion to explicate some of the terms used in section 3(5). In doing so, the Department is aided both by the common understanding of the broad terms used in ERISA section 3(5) and by the statutory context.

2. Bona Fide Groups or Associations

The Department has long taken the position that, even in the absence of the involvement of an employee organization, a single ''multiple employer plan'' under ERISA may exist where a cognizable group or association of employers, acting in the interest of its employer members, establishes a benefit program for the employees of member employers. To satisfy these criteria, the group or association must exercise control over the amendment process, plan termination, and other similar functions of the plan on behalf of the participating-employer members with respect to the plan and any trust established under the program.[19] DOL guidance generally refers to these entities—*i.e.,* entities that qualify as groups or association, within the meaning of section 3(5)—as ''bona fide'' employer groups or associations.[20] For each employer that adopts for its employees a program of pension or welfare benefits sponsored by an employer group or association that is not ''bona fide,'' such employer establishes its own separate employee benefit plan covered by ERISA.[21] Largely, but not exclusively, in the context of welfare-benefit plans, the Department has previously distinguished employer groups or associations that can act as an ERISA section 3(5) employer in sponsoring a multiple employer plan from those that cannot. To do so, the Department has asked whether the group or association has a sufficiently close economic or representational nexus to the employers and employees that participate in the welfare plan that is unrelated to the provision of benefits.[22]

DOL advisory opinions and court decisions have long applied a facts-and-circumstances approach to determine whether there is a sufficient common economic or representational interest or genuine organizational relationship for there to be a bona fide employer group or association capable of sponsoring an ERISA plan on behalf of its employer members. This analysis has focused on three broad sets of issues, in particular: (1) Whether the group or association is a bona fide organization with business/organizational purposes and functions unrelated to the provision of benefits; (2) whether the employers share some commonality and genuine organizational relationship unrelated to the provision of benefits; and (3) whether the employers that participate in a plan, either directly or indirectly, exercise control over the plan, both in form and substance. This approach has ensured that the Department's regulation of employee benefit plans is focused on employment-based arrangements, as contemplated by ERISA's text. This approach also helps distinguish the establishment by a group or association of an employee benefit plan from ''commercial insurance,''

[18] ERISA also covers benefit plans established or maintained by employee organizations and such plains operated by both employers and employee organizations.

[19] *See* 83 FR at 28912, 28920.

[20] *See, e.g.,* Advisory Opinions 2008–07A, 2003–17A, and 2001–04A.

[21] *See* 83 FR 28912, 13 (citing Advisory Opinion 96–25A).

[22] *See* 83 FR 28912; *see also* Advisory Opinions 2012–04A, 1983–21A, 1983–15A, and 1981–44A.

consonant with ERISA's structure.[23] The Department continues to believe that this approach provides for a sound reading of ERISA and that it represents a sound policy choice. Concerns for simplicity and uniformity in approach justify applying the same requirement to an entity acting as ''a group or association'' in the pension context.

3. Professional Employer Organizations

According to the IRS, the term ''PEO'' generally refers to an organization that ''. . . enters into an agreement with a client to perform some or all of the federal employment tax withholding, reporting, and payment functions related to workers performing services for the client.'' [24] The provisions of a PEO arrangement typically state that the PEO assumes certain employment responsibilities that the client-employer would otherwise fulfill with respect to employees. Under the terms of a typical PEO contract, the PEO assumes responsibility for paying the employees and for related employment tax compliance, with attending contractual responsibilities and obligations without regard to payment from the client employer to the PEO. A PEO also may manage human resources, employee benefits, workers-compensation claims, and unemployment-insurance claims for the client employer. The client employer typically pays the PEO a fee based on payroll costs plus an additional amount.[25] According to a representative of the PEO industry, ''[f]or the obligations a PEO agrees to take on with respect to its clients, the PEO assumes specific employer rights, responsibilities, and risks through the establishment and maintenance of a relationship with the workers of the client[,]'' including in some cases to ''reserve a right of direction and control of the employees with respect to particular matters.'' [26] Within the array of PEO-provided services and functions, nearly all PEOs offer some type of retirement plan to their client employers.[27]

(a) Current Primary Legal Authority

Although many PEOs administer plans for their client employers today, there is little direct authority on precisely what it means for a PEO or other entity to act ''indirectly in the interest'' of its client employers in relation to an employee benefit plan for purposes of ERISA section 3(5). But whether a PEO is an ''employer'' under section 3(5) depends on the ''indirectly in the interest of an employer'' provision, not the ''employer group or association'' provision. And neither existing subregulatory guidance nor judicial authority has articulated a specific test to determine when a PEO is sufficiently tied to its client-employer to be said to be acting ''indirectly in the interest of an employer, in relation to an employee benefit plan,'' within the meaning of section 3(5).[28] The different statutory text and differences in the nature of the employer relationships merit a different regulatory approach to PEOs than to employer groups or associations.

The IRS, for example, has already recognized that a PEO may offer a MEP for its clients under the Code. The Code sets forth rules for a plan maintained by more than one employer. Specifically, Code section 413(c) addresses the tax-qualified status of certain pension ''plans'' that cover the employees of multiple employers.[29] Under § 1.413–2(a)(2), a plan is subject to the requirements of section 413(c) if it is a single plan within the meaning of § 1.413–1(a)(2) [30] and the plan is maintained by more than one employer.

Pursuant to section 413(c) and the regulations thereunder, for purposes of certain qualification requirements, all employees of each of the employers maintaining a MEP (participating employers) are treated as being employed by a single employer.[31]

Under section 413 of the Code, other qualification rules are applied separately to each participating employer. For example, under § 1.413–2(a)(3)(ii) of the Income Tax Regulations, the minimum coverage requirements of Code section 410(b) and related nondiscrimination requirements are generally applied to a MEP on an employer-by-employer basis.

(b) Current Secondary Legal Authority

Some federal statutes treat a PEO as an ''employer'' for limited purposes in other circumstances. For instance, regulations issued pursuant to the Family and Medical Leave Act of 1993 (FMLA) specifically recognize that a PEO may, under certain circumstances, enter into a relationship with the employees of its client companies such that it is considered a ''joint employer'' for purposes of determining FMLA coverage and eligibility, enforcing the FMLA's anti-retaliation provisions, and in limited situations, providing job restoration.[32] In the main, however, the FMLA regulations clarify that a ''PEO does not enter into a joint employment relationship with the employees of its client companies when it merely performs . . . administrative functions,'' such as ''payroll benefits, regulatory paperwork, and updating employment policies.'' 29 CFR 825.106(b)(2). The regulation makes clear that PEOs do not become joint employers simply by virtue of providing such services to client-employers.

In addition, Code section 3401(d) defines the term ''employer,'' for purposes of income tax withholding, this way: ''the person for whom an individual performs or performed any service . . . as the employee of such person except that if the person for

[23] 83 FR 28914, 28917.

[24] Certified Professional Employer Organizations, 81 FR 27315–01 (May 6, 2016).

[25] Foster, Michael D., *Certified Professional Employer Organizations* (July 7, 2016) *https://www.jacksonkelly.com/tax-monitor-blog/certified-professional-employer-organizations.*

[26] National Association of Professional Employer Organizations (*https://www.napeo.org/what-is-a-peo/about-the-peo-industry/what-is-co-employment*).

[27] *See, e.g.,* Bassi, Laurie, *Professional Employer Organizations: Fueling Small business Growth,* (Sept. 2013), at 2–3 (*https://www.napeo.org/docs/default-source/white-papers/whitepaper1.pdf?sfvrsn=2*).

[28] The lack of a specific and clear test leads to different outcomes. *Compare Yearous* v. *Pacificare of California,* 554 F. Supp. 2d 1132 (S.D. Cal. 2007) (applying factors in *Nationwide Mut. Ins. Co.* v. *Darden,* 503 U.S. 318 (1992), court concluded that PEO is direct employer of owner of company for purposes of sponsoring an ERISA covered healthcare plan covering the owner and his beneficiaries) *with Texas* v. *Alliance Employee Leasing Co.,* 797 F. Supp. 542 (N.D. Tex. 1992) (finding leasing company did not act directly or indirectly as employer under ERISA).

[29] Several of the rules applicable to plans under section 413(c) of the Code are parallel to the rules for plans maintained by more than one employer under section 210 of ERISA. Under section 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713), the Secretary of the Treasury has interpretive jurisdiction over ERISA section 210.

[30] Section 1.413–1(a)(2) applies the definition of a single plan in § 1.414(l)–1(b), providing that a plan is a single plan if and only if, on an ongoing basis, all of the plan assets are available to pay benefits to employees who are covered by the plan and their beneficiaries.

[31] For example, under section 413(c)(1) of the Code and § 1.413–2(b) of the Income Tax Regulations, Code section 410(a) (participation) and the regulations thereunder are applied as if all employees of each of the employers who maintain the plan are employed by a single employer. In addition, under section 413(c)(2) of the Code and § 1.413–2(c) of the Income Tax Regulations, in determining whether a MEP is, with respect to each participating employer, for the exclusive benefit of its employees (and their beneficiaries), all of the employees participating in the plan are treated as employees of each such employer. See IRS Rev. Proc. 2002–21 (providing ''a framework under which plans sponsored by PEOs will not be treated as violating the exclusive benefit rule solely because they provide benefits to Worksite Employees.''). Finally, under section 413(c)(3) of the Code and § 1.413–2(d) of the Income Tax regulations, Code section 411 (minimum vesting standards) and the regulations thereunder are generally applied as if all employers who maintain the plan constituted a single employer.

[32] 29 CFR 825.106(b)(2), (e).

whom the individual performs or performed the services does not have control of the payment of the wages for such services, [then] the term 'employer' . . . means the person having control of the payment of such wages.'' [33]

An entity meeting these requirements is referred to as the ''statutory employer.'' Although generally PEOs do not have exclusive control of the payment of wages within the meaning of the applicable regulations requiring ''legal control'', in some cases, a PEO has been found to be the employer under Code § 3401(d)(1) under the facts of the case.[34]

Furthermore, the Tax Increase Prevention Act of 2014, Public Law 113–295 (Dec. 19, 2014) required the IRS to establish a voluntary certification program for such PEOs (CPEO Program) as discussed in more detail below.

The CPEO Program recognizes PEOs that meet certain requirements within the Code and provides a level of assurance to small-business owners that rely on a CPEO to handle their employment-tax issues. CPEOs are treated as employers under the Code for employment tax purposes with regard to remuneration paid to their customers' employees under CPEO service contracts. A CPEO is solely liable for the employment tax withholding, payment, and reporting obligations with respect to remuneration it pays to work site employees (as defined in IRC 7705(e)).'' [35]

D. Overview of Proposed Regulation

1. General

The Department believes that providing additional opportunities for employers to join MEPs as a way to offer workplace retirement savings plans to their employees could, under the conditions proposed here, offer many small businesses more affordable and less burdensome retirement savings plan alternatives than are currently available. The Department expects that the proposal, if finalized, would prompt some small businesses that do not currently offer workplace retirement benefits to offer such benefits. The proposal could increase the number of employees enrolled in workplace retirement plans, thereby offering America's workers better retirement savings opportunities and greater retirement security.

Paragraph (a) of the proposal defines the scope of the rulemaking. This paragraph provides that bona fide employer groups or associations and bona fide PEOs may act as an ''employer'' under ERISA section 3(5) for purposes of sponsoring a MEP. In each case, this interpretation is based upon the Department's conclusion that such bona fide employer groups, associations, or PEOs act ''in the interest of'' their employer members in relation to a retirement savings plan. Paragraph (a) would limit this rulemaking to defined contribution plans, as defined in ERISA section 3(34); the proposal thus does not cover welfare plans or other types of pension plans. The proposal is limited in this manner because the Department believes that consideration and development of any proposal covering other types of pension and welfare plans or other persons or organizations as plan sponsors would benefit from public comments and additional consideration by the Department.

2. Bona Fide Employer Groups or Associations

Paragraph (b) of the proposal would define and clarify the criteria for a ''bona fide'' group or association of employers capable of establishing a MEP.[36] This paragraph would replace and supersede criteria in prior subregulatory guidance. The proposed criteria are intended to distinguish bona fide group or association MEPs from products and services offered by purely commercial pension administrators, managers, and record keepers. These commercial enterprises are outside the scope of the rule as proposed.[37]

Specifically, paragraph (b)(1) of the proposal contains seven criteria for determining whether a group or association of employers is a ''bona fide'' group or association of employers for purposes of ERISA section 3(5) and the regulation. With one exception, these criteria parallel those used in the AHP Rule and are intended to have the same meaning and effect here, as they have there. Four of the criteria provide that the group or association must have a formal organizational structure, be controlled by its employer members, have at least one substantial business purpose unrelated to offering and providing employee benefits to its employer members, and limit plan participation to employees and former employees of employer members.[38] Two other criteria provide that employer members must have a commonality of interest and that each employer must act directly as an employer of at least one employee participating in the MEP. The intent of including these criteria in paragraph (b) is to distinguish between groups and associations that act as employers within the meaning of ERISA section 3(5), from other entities that do not act as an ''employer.'' As explained in the AHP Rule, ERISA section 3(5) of ERISA and ERISA Title I's overall structure contemplate employment-based benefit arrangements.[39] Moreover, the Department's authority to define ''employer'' and ''group or association of employers'' under ERISA section 3(5) does not broadly extend to arrangements established to provide benefits outside the employment context and without regard to the members' status as employers.[40]

The AHP Rule, in relevant part, prohibits health-insurance companies from being treated as a bona fide group or association. A construction of ''employer'' encompassing insurance companies that are merely selling commercial insurance products and services to employers would effectively read the definition's employment-based limitation out of the statute. 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. Accordingly, the Department required that the individual employer members of the group or association must control the AHP, and the Department declined to construe ''employer'' in a manner that would permit commercial insurers to market insurance products and services as AHP sponsors.

[33] In *Otte* v. *United States,* 419 U.S. 43 (1974), the Supreme Court held that a person who is an employer under section 3401(d)(1), relating to income tax withholding, is also an employer for purposes of withholding the employee share of Federal Insurance Contributions Act (FICA) under section 3102. The *Otte* decision has been extended to provide that the person having control of the payment of the wages is also an employer for purposes of section 3111, which imposes the FICA tax on employers, and section 3301 (Federal Unemployment Tax Act (FUTA) tax). See *In re Armadillo Corp.,* 410 F. Supp. 407 (D. Colo. 1976), affd, 561 F.2d 1382 (10th Cir. 1977); *In re The Laub Baking Co.,* 642 F.2d 196, 199 (6th Cir.1981).

[34] *United States* v. *Total Employment Co. Inc., 305 B.R. 333 (M.D. Fla. 2004).*

[35] See IRC section 3511(a)(1).

[36] The term ''bona fide'' in the proposal refers to a group, association, or PEO that meets the conditions of the proposed regulation and, therefore, is able to be an ''employer'' for purposes of section 3(5) of ERISA. No inferences should be drawn from the use of this term regarding the actual bona fides of the group, association or organization outside of this context.

[37] *See* Section E, Request for Public Comments.

[38] A bona fide group or association may sponsor both an AHP and a MEP, but the group or association would have to have at least one substantial business purpose other than offering employee benefit plans.

[39] 83 FR 28912, 28913 (June 21, 2018).

[40] *Id.* at 28916.

The Department believes 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. The Department therefore applies a similar approach to employer groups or associations sponsoring MEPs. Accordingly, paragraph (b)(vii) of the proposal would prohibit an employer group or association from being a bank, trust company, insurance issuer, broker-dealer, or other similar financial-services firm (including pension record keepers and third-party administrators) and from being owned or controlled by such a financial-services firm.

The proposed rule does not contain provisions analogous to the healthcare nondiscrimination provisions of the AHP Rule because defined contribution retirement plans do not underwrite health risk and are not susceptible to the rating and segmentation pressures that characterize the healthcare marketplaces. Some defined contribution plans may offer lifetime income features, such as immediate or deferred annuities, which potentially implicate some degree of longevity risk. The Department, however, does not believe the presence of longevity risk in ancillary features of defined contribution MEPs warrants nondiscrimination provisions analogous to those of the AHP Rule. The Department also believes that any relevant nondiscrimination concerns are already addressed in the tax-qualification provisions of the Code or other federal laws. The Department solicits comments on this issue.

Paragraph (b)(2) of the proposal sets forth standards for determining whether employers have sufficient commonality of interests for purposes of the commonality requirement in paragraph (b)(1). Specifically, this paragraph would allow employers to band together for the express purpose of offering MEP coverage if the employers are in the same trade, industry, line of business, or profession; or if the employers 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). Determinations of what is a ''trade,'' ''industry,'' ''line of business,'' or ''profession,'' as well as whether an employer fits into one or more of these categories, are based on all relevant facts and circumstances; the Department intends for these terms to be construed broadly to expand employer and employee access to MEP coverage.

3. Professional Employer Organizations

Paragraph (c) of the proposal would establish four criteria that must be met for a PEO to qualify as a ''bona fide'' PEO that may act ''indirectly in the interest of [its client] employers'' and, consequently, as an ''employer'' under ERISA section 3(5) for purposes of sponsoring a MEP covering the employees of client employers. Specifically, paragraph (c)(1)(i) of the proposal would require the PEO to perform substantial employment functions on behalf of the client employers. Paragraph (c)(1)(ii) would require the PEO to have substantial control over the functions and activities of the MEP, and assume certain statutory roles under ERISA. As further explained below, looking to substantial control is sensible given the language of section 3(5) of ERISA. Paragraph (c)(1)(iii) would require the PEO to ensure that each client-employer participating in the MEP has at least one employee who is a participant covered under the MEP. Paragraph (c)(1)(iv) of the proposal would provide that the PEO must ensure that participation in the MEP is limited to current and former employees of the PEO and of client-employers, as well as their beneficiaries.

A PEO's assumption and performance of substantial employment functions on behalf of its client-employers is one of the lynchpins of the proposal. Just as commonality and control establish the nexus for groups or associations of employers under paragraph (b) of the proposal, the PEO's assumption and performance of employment functions for its client employers contributes significantly to the establishment of the requisite nexus for PEOs. Requiring the PEO to stand in the shoes of the participating client employers—by assuming and performing substantial employment functions that the client-employers otherwise would fulfill with respect to their employees—is what distinguishes bona fide PEOs under the proposal from service providers or other entrepreneurial ventures that in substance merely market or offer client-employers access to retirement plan services and products. This requirement applies a clear limiting principle to entities that can be said to be acting ''indirectly in the interest of'' another employer within the meaning of ERISA section 3(5).

A PEO's status under this proposal and whether a PEO performs substantial employment functions as described herein, however, is not tantamount to the PEO's assumption or creation of an employment relationship (whether referred to as joint employment or otherwise) with the client-employer, for purposes of other laws or liabilities. The question of joint employment for purposes of other laws and liabilities is an independent inquiry wholly unaffected by a PEO's potential status as an ''employer'' within the meaning of ERISA section 3(5). Whether a PEO qualifies as an ERISA section 3(5) ''employer'' under the ''indirectly'' provision has no effect on the rights or responsibilities of any party under any other law, including the Code, and neither supports nor prohibits a finding of an employment relationship.

A second important limiting principle in construing section 3(5)'s ''indirectly in the interest of'' clause is that the PEO must have substantial control of the functions and activities of the employee benefit plan at issue. This construction comports with the definition's reference to a person acting as the employer ''in relation to the plan.'' Consequently, paragraph (c)(1)(ii) of the proposal would require the PEO to have 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), the 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).

To provide guidance on what is meant by performing ''substantial employment functions'' under the proposal, paragraph (c)(2)(ii) of the proposed rule provides a disjunctive list of nine relevant criteria, even one of which may be sufficient to establish substantiality depending on the particular facts and circumstances and the particular criterion. This list was drawn from the types of services and functions PEOs routinely offer their clients, and with reference to the CPEO statutory and regulatory provisions.

The list of ''substantial employment functions'' in paragraph (c)(2)(ii) of the proposal would look to whether, with respect to client-employer employees participating in the PEO's plan, the organization is responsible for:

- Payment of wages to the employees without regard to the receipt or adequacy of payment from its client employers;
- Reporting, withholding, and paying any applicable federal employment taxes, without regard to the receipt or adequacy of payment from its client employers;
- Recruiting, hiring, and firing workers in addition to the client-employer's responsibility for recruiting, hiring, and firing workers;
- Establishing employment policies, conditions of employment, and

supervising employees in addition to the client-employer's responsibility to perform these same functions;

• Determining employee compensation, including method and amount, in addition to the client-employer's responsibility to determine employee compensation;

• Providing workers' compensation coverage in satisfaction of applicable State law, without regard to the receipt or adequacy of payment from its client employers;

• Integral human-resource functions, such as job description development, background screening, drug testing, employee-handbook preparation, performance review, paid time-off tracking, employee grievances, or exit interviews, in addition to the client employer's responsibility to perform these same functions;

• Regulatory compliance in the areas of workplace discrimination, family and medical leave, citizenship or immigration status, workplace safety and health, or permanent labor-certification program, in addition to the client employer's responsibility for regulatory compliance; or

• The organization continues to have employee benefit plan obligations to MEP participants after the client employer no longer contracts with the organization.

The proposal provides that, depending on the facts and circumstances of the particular situation, even one of these criteria alone may be sufficient to satisfy the requirement that a PEO perform substantial employment functions on behalf of its client employers. Just as a way of illustrating the Department's intent with respect to the provision, with respect to the PEO's responsibility to supervise employees of client employers (as contemplated under the criterion in paragraph (c)(2)(ii)(D) of the proposal), the Department would likely consider a PEO to meet the substantiality requirement if, for example, the PEO controlled the manner and means by which employees accomplished their assigned chores or completed their assignments, without regard to the extent or degree to which the PEO satisfied the other eight criteria. On the other hand, the Department likely would not reach the same conclusion if the only function performed by the PEO, for example, is that it performs drug testing on behalf of its client-employers, even if the PEO assumes complete responsibility for that task.

Although this approach offers PEOs the flexibility of a facts-and-circumstances approach, the Department also understands that some entities may prefer more regulatory certainty in ordering their business affairs. For this reason, the proposal contains two regulatory safe harbors separate from the facts-and-circumstances test described above.

The first safe harbor provides that a PEO will be considered to perform substantial employment functions on behalf of its client-employers if it is a ''certified professional employer organization'' (CPEO) within the meaning of Code section 7705 and regulations thereunder, has a ''service contract'' within the meaning of Code section 7705(e)(2) with the client employers who adopt the MEP with respect to the client-employer employees participating in the MEP, satisfies the criteria in paragraphs (c)(2)(ii)(A)–(C) of the proposal, and also meets at least two criteria listed in paragraph (c)(2)(ii)(D) through (I) of the proposal. Generally a CPEO is a PEO that has applied for certification and has been certified by the Internal Revenue Service (IRS) as meeting the requirements of Code section 7705(b). To become and remain a CPEO, a PEO must demonstrate (and continue to demonstrate) to the IRS that it meets specified requirements relating to tax status, background, experience, business location, and annual financial audits. Among other requirements, to become and remain a CPEO, the PEO must also agree to satisfy certain bond, financial review, and reporting requirements.[41] The IRS has the authority to suspend and revoke the certification of any CPEO if it determines that the CPEO is not satisfying the requirements of Code sections 7705(b) or (c) or fails to satisfy applicable accounting, reporting, payment, or deposit requirements. These attributes are also relevant to employers' consideration of PEOs when evaluating retirement options because they may reduce the potential for fraud, abuse, and mismanagement with respect to employment functions.

The second safe harbor is for PEOs that do not satisfy the CPEO safe harbor but meet five or more criteria from the list in paragraph (c)(2)(ii) of the proposal. The Department understands that the CPEO Program is voluntary; therefore, not all PEOs are (or remain) CPEOs. The Department does not believe that the absence of CPEO status necessarily should disqualify a PEO from acting as an employer in sponsoring a MEP. This safe harbor thus applies when covered PEOs meet at least half of the relevant criteria, with the choice as to the five particular criteria left to the discretion of the PEO based on its business structure and operations. Although any single criterion alone may, depending on the facts and circumstances and particular criterion, be sufficient to satisfy the requirement that a PEO perform substantial employment functions on behalf of its client employers, as a safe harbor, the Department is of the view that meeting at least half of the listed criteria demonstrates convincingly that the PEO is performing substantial employment functions and ensures that PEOs using this safe harbor provision will fall well within the definition in section 3(5). The same standard of five criteria also effectively applies to the CPEO safe harbor in paragraph (c)(2)(i) of the proposal because CPEOs entering into CPEO service-contracts within the meaning of section 7705(e)(2) with client-employers who adopt the MEP must both assume and perform employment functions on behalf of client-employers under the relevant criteria set forth in paragraph (c)(2)(ii)(A)–(C) of the proposed regulation with respect to the client-employer employees participating in the MEP, and would still need to satisfy two more criteria to fall within the CPEO safe harbor.

4. Dual Treatment of Working Owners as Employers and Employees

Like the AHP Rule,[42] paragraph (d) of this proposed rule would expressly provide that working owners, such as sole proprietors and other self-employed individuals, may elect to act as employers for purposes of participating in a bona fide employer group or association as described in (b)(1) of the proposed regulation and also be treated as employees of their businesses for purposes of being able to participate in the MEP.

To qualify as a working owner, a person would be required to work at least 20 hours per week or 80 hours per month, on average, or have wages or self-employment income above a certain level. Specifically, the working owner's wages or self-employment income must equal or exceed the working owner's cost of coverage to participate in the group or association's health plan, if the group or association has such a plan. In other words, if the working owner makes enough money to be considered both an employer and employee under the AHP Rule, the working owner may also be considered both an employer

[41] IRC section 7705(b) and (c); 26 CFR 301.7705–2T—CPEO Certification Requirements.

[42] 83 FR at 28964.

and employee under this proposal.[43] The Department adopts this threshold because, unlike healthcare coverage, participation in a MEP does not have a specific dollar amount associated with the benefits; thus, there is no minimum cost of participation.[44]

The proposed rule would not extend this definition to MEPs sponsored by PEOs under paragraph (c) of the proposal. Thus, a working owner's trade or business would have to have at least one common law employee to participate in a PEO's MEP under paragraph (c) of the proposed regulation. The Department understands that working owners without employees generally would not have need for the employment services of PEOs, such as payroll, compliance with federal and state workplace laws, and human-resources support. Thus, a trade or business without employees would not seem to have a genuine need for a relationship with a PEO. Accordingly, the working-owner provision would only apply for purposes of participation in MEPs sponsored by a bona fide group or association. The Department understands, however, that there may be circumstances in which a working owner without common law employees has a genuine need to be in a PEO's MEP. For example, if the working owner has had common law employees and used a PEO, including joining the PEO's MEP, but was later unable to afford to continue to employ others and did not want to stop participating in the PEO plan. Accordingly, the Department solicits comments on the circumstances, if any, under which working owners without employees should be able to participate in a multiple employer plan through a PEO under title I of ERISA.

E. Request for Public Comments

The proposed regulation addresses when a group or association of employers or PEO falls within the definition of ''employer'' under ERISA section 3(5) for purposes of sponsoring a MEP under title I of ERISA to cover the employees of member employers. The Department invites comments on all aspects of this proposal, including its scope, as well any data, studies or other information that would help refine and improve the proposal's estimated costs, benefits, and transfers.

The Executive Order called on the Department to consider more generally whether businesses or organizations other than groups or associations of employers and PEOs should be able to sponsor a single MEP under title I of ERISA by acting indirectly in the interest of participating employers in relation to the plan within the meaning of ERISA section 3(5). The Department is aware of at least two other types or categories of MEPs not specifically addressed in the proposed rule.[45] While both of these categories are outside the scope of the rule as proposed, the Department specifically solicits public comments on whether the Department should address one or more of these other categories of MEPs, by regulation or otherwise.

The first category includes so-called ''corporate MEPs,'' which are plans that cover employees of related employers which are not in the same controlled group or affiliated service group, within the meaning of section 414(b), (c), and (m) of the Code. While corporate MEPs are not directly addressed in this guidance, the Department does not intend to convey that a corporate MEP could not be a single employee benefit plan under title I of ERISA. Rather, comments specifically are requested on whether any regulatory provisions or other guidance is needed to address the MEP status of plans maintained by such related employers.

The second category consists of ''open MEPs,'' which are plans that cover employees of employers with no relationship other than their joint participation in the MEP. As mentioned earlier in this preamble, many recent legislative proposals center on these later arrangements, which are often referred to as ''pooled employer plans.'' Comments specifically are requested on whether, and under what circumstances, so-called ''open MEPs'' or ''pooled employer plans,'' as depicted in the various legislative proposals, could be operated as an employment-based arrangement, as contemplated by ERISA's text. To the extent commenters believe that these arrangements should be addressed in this or a future rulemaking, the Department asks that the comments include a discussion of why such an arrangement should be treated as one employee benefit plan within the meaning of title I of ERISA rather than as a collection of separate employer plans being serviced by a commercial enterprise that provides retirement plan products and services. Such commenters also should provide suggestions regarding the regulatory conditions that should apply to the particular arrangement.

The Department solicits comments on whether including working owners in the current proposal could affect the utility of 401(k) plans for working owners, who may prefer those plans because of their ERISA-exempt status (or other reasons). Under current law, working owners without employees can sponsor 401(k) plans, often called solo-401(k) plans. Under the Code, these plans, like other 401(k) plans, are subject to rules concerning eligibility, contributions, taxes, and distributions. Solo 401(k) plans, however, have historically been outside the coverage of title 1 of ERISA. 29 CFR 2510.3–3. The Department's proposal would permit working owners to participate in ERISA-covered MEPs without altering its position that a ''plan under which . . . only a sole proprietor'' participates ''will not be covered under title I.'' 29 CFR 2510.3–3(b). The Department seeks comments on whether additional or different regulatory amendments should be made to confirm or clarify the long-established exclusion from ERISA of solo 401(k) plans, given the proposal to permit working owners to participate in ERISA-covered ARPs.

Comments are also invited on the interaction of the proposal with and consequences under other state and federal laws, including the interaction

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[43] The earned income standard in the proposal is informed by Federal tax standards, including section 162(l) of the Code, that describe conditions for self-employed individuals to deduct the cost of health insurance. Thus, for purposes of the working owner provisions of paragraph (d) of the proposal, the definitions of ''wages'' and ''self-employment income'' in Code sections 3121(a) and 1402(b) (but without regard to the exclusion in section 1402(b)(2)), respectively, would apply.

[44] Under section 401(c) of the Code, a self-employed individual must have earned income in order to participate in a qualified retirement plan. The Department's provisional view is that it seems unlikely that a ''working owner'' as defined in paragraph (d)(2) of the proposal who is not a common law employee would fail to meet the requirements of section 401(c) of the Code. The Department invites comments on whether this view is correct, and if not correct, whether a final rule should include changes to the working-owner definition for MEPs designed to be qualified under section 401(a) of the Code. For example, a final rule could further limit the definition of working owners to self-employed individuals described in 401(c) of the Code. One way to accomplish this limitation could be to add a condition to paragraph (d)(2) of the proposal to ensure that the working owner ''is an employee within the meaning of section 401(c)(1) of the Code, and the employer of such individual is the person treated as his employer under section 401(c)(4) of the Code.'' Alternatively, consistent with E.O. 13847 and the Code, the Department invites comments on whether, if the Department's provisional view is not correct, the Secretary of the Treasury should consider action pursuant to Section 2(b) of E.O. 13847, which directs the Secretary of the Treasury to consider proposing amendments to regulations or other guidance regarding the circumstances under which a MEP must satisfy the tax qualification requirements in the Code. Because the Secretary of the Treasury has interpretive jurisdiction over section 401 of the Code, any comments relating to this topic will be shared with the Department of the Treasury.

[45] A 2012 GAO report separated MEPs into four categories. U.S. Government Accountability Office, GAO, ''12–665, ''Private Sector Pensions—Federal Agencies Should Collect Data and Coordinate Oversight of Multiple Employer Plans,'' (Sept. 2012) (*https://www.gao.gov/products/GAO-12-665*).

with Code section 413(c), which would apply to all tax-qualified MEPs including those described in paragraph (b) and (c) of the proposal.[46] The Department's provisional view is that it seems unlikely that a MEP that is sponsored and maintained by an employer group or association or PEO, and that is subject to the rules of section 413(c) of the Code, would fail to qualify under the Department's proposed criteria. The Department invites comments on whether this view is correct and, if not correct, on the extent to which grandfathering rules or transitional assistance or guidance might be advisable.

The Department also invites 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. Comments are also solicited for data, studies or other information that would help estimate the benefits, costs, and transfers.

As indicated, a MEP would be a single ERISA plan under title I of ERISA if it complies with the requirements in the proposed rule. As such, ERISA would apply to the MEP in the same way that ERISA applies to any employee benefit plan, but the MEP sponsor, typically acting as the plan's administrator and named fiduciary, would administer the MEP.[47] This person will have considerable discretion in determining, as a matter of plan design or a matter of plan administration, how to treat the different interests of the multiple participating employers and their employees. Accordingly, this person, in distributing, investing, and managing the MEP's assets, must be neutral and fair, dealing impartially with the participating employers and their employees, taking into account any differing interests.[48] For example, when the fiduciary of a large MEP uses its size to negotiate and secure discounted prices on investments and other services from plan services providers, as is generally required by ERISA, the fiduciary is bargaining on behalf of all participants regardless of the size of their employer, and should take care to see that these advantages are allocated among participants in an evenhanded manner. Treating participating employers and their employees differently without a reasonable and equitable basis would raise serious concerns for the Department. Comments are invited on whether there is a need for guidance or clarification on the application of this principle to the various aspects of MEP administration, including investment management, recordkeeping, and allocating plan costs and expenses among the participants and beneficiaries of participating employers.

F. Regulatory Impact Analysis

1. Summary

As discussed earlier in this preamble, this proposed rule is intended to facilitate the creation and maintenance of MEPs by clarifying the circumstances under which a person may act as an ''employer'' within the meaning of ERISA section 3(5) in sponsoring a MEP. Workplace retirement plans provide an effective way for employees to save for retirement. Many hardworking Americans, however, do not have access to a retirement plan at work, especially those employed by small employers or acting as ''working owners'' without employees (referred to herein as the ''self-employed''). This has become a more significant issue as employees are living longer and facing the difficult prospect of outliving their retirement savings. Expanding access to private sector MEPs could encourage the formation of workplace retirement plans and broaden the access to such plans among small employers and the self-employed.

Many employer groups and associations have a thorough knowledge of the economic challenges their members face. Using this knowledge and the regulatory flexibility provided by this proposed rule, employer groups and associations could sponsor MEPs tailored to the retirement plan needs of their members at lower costs than currently available options. Thus, this proposed rule, if finalized, could provide employers with an important option to increase access of workers, particularly those employed at small businesses and the self-employed, to high-quality workplace retirement plans.

Small employers could benefit from economies of scale by participating in MEPs, which could reduce their administrative burdens, fiduciary liability exposure, and plan fees. Like other large retirement plans, large MEPs created by sponsors meeting the conditions set forth in the proposal would enjoy scale discounts and might exercise bargaining power with financial services companies. Large MEPs would pass some of these savings through to participating small employers. In particular, investment funds with tiered pricing have decreasing expense ratios based on the aggregate amount of money invested by a single plan.[49] As a single plan, MEPs should lower the expense ratio for investment management through the pooling of investments from member employers because the fee thresholds would apply at the MEP level rather than at the member employer level.[50]

Many well-established, geographically based organizations, such as local chambers of commerce, are strong candidates to sponsor MEPs. Currently, these geographically based organizations are restricted from doing so as a sponsor of a single plan under title I of ERISA, however, unless their MEP meets the requirements of the Department's 2012 subregulatory guidance for determining whether groups or associations of employers, or PEOs were able to act as employers under section 3(5) of ERISA. Such previous guidance requires groups or associations to have a particularly close economic or representational nexus to employers and employees participating in the plan. Many groups or associations and PEOs have identified these criteria, along with the absence of a clear

[46] Under section 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713), the Secretary of the Treasury has interpretive jurisdiction over section 413 of the Code and ERISA section 210. Accordingly, any comments relating to section 413(c) of the Code will be shared with the Department of the Treasury.

[47] As noted elsewhere, in the case of a PEO MEP under paragraph (c) of the proposal, the PEO, as the plan sponsor, must always act as the plan's administrator (within the meaning of section 3(16)(A)) and a named fiduciary (within the meaning of section 402 of ERISA) of the MEP.

[48] *See* Field Assistance Bulletin No. 2003–03 (addressing what rules apply to how expenses are allocated among plan participants in a defined contribution pension plan). *See also Varity Corp.* v. *Howe,* 516 U.S. 489, 514 (1996) (''The common law of trusts recognizes the need to preserve assets to satisfy future, as well as present, claims and requires a trustee to take impartial account of the interests of all beneficiaries.''); *Restatement (Second) of Trusts* section 183 (''If a trust has two or more beneficiaries, the trustee, in distributing, investing, and managing the trust property, shall deal impartially with them, taking into account any differing interests.'')

[49] According to Morningstar, nearly half of all investment funds have management fee breakpoints at which fees are automatically reduced upon reaching an investment threshold. *See* Michael Rawson and Ben Johnson, ''2015 Fee Study: Investors Are Driving Expense Ratios Down,'' Morningstar, 2015, available at *https://news.morningstar.com/pdfs/2015_fee_study.pdf.*

[50] MEPs create a pool of assets for investment that, at the investment management level, are no different from pools of assets from other employee benefit plans. Consistent with the Department's view that the pool of assets is a single plan, the Department expects that breakpoints for expense ratios would be applied at the MEP level rather than at the member employer level. The Department solicits comments on this matter.

pathway for PEOs to sponsor MEPs, as major impediments to the expansion of MEPs that are treated as single plans. By providing greater flexibility governing the sponsorship of MEPs, the Department expects that this proposed rule would reduce costs and increase access to workplace retirement plans for many employees of small businesses and the self-employed.

Other benefits of the expansion of MEPs include: (1) Increased economic efficiency as small firms can more easily compete with larger firms in recruiting and retaining workers; (2) increased tax equity as workers who previously did not have access to a qualified workplace retirement plan begin to benefit from tax savings when their employers provide access to a retirement plan through a MEP; (3) enhanced portability for employees that leave employment with an employer to work for another employer participating in the same MEP; and (4) higher quality data (more accurate and complete) reported on the Form 5500.

The Department is aware that MEPs could be the target of fraud or abuse. By their nature, MEPs have the potential to build up a substantial amount of assets quickly and the effect of any abusive schemes on future retirement distributions may be hidden or difficult to detect for a long period. The Department, however, is not aware of direct information indicating that the risk for fraud and abuse is greater for MEPs than for single employer defined contribution pension plans. Furthermore, the Department has compliance assistance and enforcement systems in place to safeguard plan assets.

The Department believes that participation in workplace retirement plans would increase because of this proposal; however, there is some uncertainty regarding the extent. Participation levels in workplace retirement plans depend on both how many employers decide to offer plans and how many employees choose to participate in those plans. An employer's decision to offer a retirement plan relies on many factors, only some of which this proposed rule would affect. If more employers adopt MEPs, it is unclear how many of their employees would choose to enroll and by how much aggregate retirement savings would increase. Nevertheless, given the significant potential for MEPs to expand access to affordable retirement plans, the Department has concluded that this proposed rule would deliver social benefits that justify its costs. Its analysis is explained more fully below.

2. Executive Orders

Executive Orders 12866 [51] and 13563 [52] direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

Under Executive Order 12866, ''significant'' regulatory actions are subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive Order defines a ''significant regulatory action'' as an action that is likely to result in a rule: (1) Having an annual effect on the economy of $100 million or more in any one year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. It has been determined that this proposed rule is economically significant within the meaning of section 3(f)(1) of the Executive Order. Therefore, OMB has reviewed the proposed rule pursuant to the Executive Order. The background to the proposed rule is discussed earlier in this preamble. This section assesses the expected economic effects of the proposed rule.

3. Introduction and Need for Regulation

While many Americans have accumulated significant retirement savings, many others have little, if any, assets saved for retirement. For example, the Employee Benefit Research Institute projects that 24 percent of the population aged 35–64 will experience a retirement savings shortfall, meaning resources in retirement will not be sufficient to meet their average retirement expenditures.[53] If uncovered long-term care expenses from nursing homes and home health care are included in the retirement readiness calculation, 43 percent of that population will experience a shortfall, and the projected retirement savings deficit is $4.13 trillion.[54]

Among all workers aged 26 to 64 in 2013, 63 percent participated in a retirement plan either directly or through a working spouse. That percentage ranged, however, from 52 percent of those aged 26 to 34 to 68 percent of those aged 55 to 64; and from 25 percent for those with adjusted gross income (AGI) less than $20,000 per person to 85 percent for those with AGI of $100,000 per person or more.[55]

Workplace retirement plans often provide a more effective way for employees to save for retirement than saving in their own IRAs. Compared with IRAs, workplace retirement plans provide employees with: (1) Higher contribution limits; (2) generally lower investment management fees as the size of plan assets increases; (3) a well-established uniform regulatory structure with important consumer protections, including fiduciary obligations, recordkeeping and disclosure requirements, legal accountability provisions, and spousal protections; (4) automatic enrollment; and (5) stronger protections from creditors.[56] At the same time, workplace retirement plans provide employers with choice among plan features and the flexibility to tailor retirement plans that meet their business and employment needs.

In spite of these advantages, many workers, particularly those employed by small employers and the self-employed, lack access to workplace retirement plans. Table 1 below shows that at business establishments with fewer than 50 workers, 49 percent of the workers have access to retirement benefits.[57] In contrast, at business establishments with more than 500 workers, 88 percent

[51] 58 FR 51735 (Oct. 4, 1993).

[52] 76 FR 3821 (Jan. 21, 2011).

[53] Jack VanDerhei, ''EBRI Retirement Security Projection Model ®(RSPM)—Analyzing Policy and Design Proposals,'' *Employee Benefit Research Institute Issue Brief,* no. 451 (May 31, 2018).

[54] *Id.*

[55] Peter J. Brady, ''Who Participates in Retirement Plans,'' *ICI Research Perspective,* vol. 23, no. 05, (July 2017.).

[56] Section 522 of the Bankruptcy Code (11 U.S.C. 522), provides an unlimited exemption for SEP and Simple IRAs, and pension, profit sharing, and qualified plans, such as 401(k)s, as well as plan assets that are rolled over to an IRA. However, other traditional IRAs and Roth IRAs are protected up to a value of $1,283,025 per person for 2018 (inflation adjusted).

[57] These statistics apply to private industry. U.S. Bureau of Labor Statistics, National Compensation Survey, Employee Benefits in the U.S. (March 2018).

of workers have access to retirement benefits. Table 1 also shows that many small employers do not offer a retirement plan to their workers.[58]

TABLE 1—RETIREMENT PLAN COVERAGE BY EMPLOYER SIZE

Establishment size: Number of workers	Workers: Share with access to a retirement plan (%)	Workers: Share participating in a retirement plan (%)	Establishments: Share offering a retirement plan (%)
1–49	49	34	45
50–99	65	46	75
100–499	79	58	88
500+	89	76	94
All	66	50	48

Source: These statistics apply to private industry. U.S. Bureau of Labor Statistics, National Compensation Survey, Employee Benefits in the U.S. (March 2018).

Surveys of employers have suggested several reasons employers—especially small businesses—do not offer a workplace retirement plan to their employees. Regulatory burdens and complexity add costs and can be significant disincentives. A survey by the Pew Charitable Trusts found that only 53 percent of small-to mid-sized businesses offer a retirement plan, and 37 percent of those not offering a plan cited cost as the main reason.[59] Employers often also cite annual reporting costs and exposure to potential fiduciary liability as major impediments to plan sponsorship.[60]

Some employers may also have not offered retirement benefits because they do not perceive such benefits as necessary to recruit and retain good employees.[61] In focus groups, many employers not offering retirement benefits reported believing that their employees would prefer to receive higher salaries, more paid time-off, or health insurance benefits than retirement benefits.[62] Small employers themselves may not have much incentive to offer retirement benefits because they are not sure how long their businesses are going to survive. This may lead them to focus on short-term concerns rather than their employees' long-term well-being. In analyzing new establishments, researchers found that 56 percent did not survive for four years.[63]

Many small businesses also may have not taken advantage of the existing opportunities to establish workplace retirement savings plans because of a lack of awareness. As found in a Pew survey, two-thirds of small and midsize employers that were not offering a retirement plan said they were not at all familiar with currently available options such as Simplified Employee Pension (SEP) and Savings Incentive Match Plan for Employees (SIMPLE) plans.[64]

MEPs may address several of these issues. Specifically, to the extent that MEPs reduce the total cost of providing various types of plans to small employers, market forces may lead MEPs to offer and promote such plans to small employers that would otherwise have been overlooked because of high costs. Moreover, groups or associations and PEOs sponsoring MEPs sometimes may have more success raising (1) the awareness of retirement savings plan options for small employers, particularly where such employers are already clients or members, and (2) the benefits of establishing such plans as a tool for recruiting or retaining qualified workers.

Small businesses typically have fewer administrative efficiencies and less potential bargaining power than large employers do. The proposal could provide a way for small employers and the self-employed to band together in MEPs that, as single, large plans, have some of the same economic advantages as other large plans. As discussed above, the Department's prior subregulatory guidance limits the ability of small employers and self-employed individuals to join MEPs and thereby to realize attendant potential administrative cost savings. With certain exceptions, each employer operating a separate plan must file its own Form 5500 annual report, and generally, if the plan has 100 or more participants, an accountant's audit of the plan's financial position instead of relying on the audit of a combined plan.[65] Each small employer also would have to obtain a separate fidelity bond satisfying the requirements of ERISA.[66]

As stated earlier in this preamble, on August 31, 2018, President Trump issued Executive Order 13847,

[58] *Id.*

[59] The Pew Charitable Trusts, ''Employer Barriers to and Motivations for Offering Retirement Benefits,'' *Issue Brief* (June 21, 2017). *http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/06/employer-barriers-to-and-motivations-for-offering-retirement-benefits#0-overview*.

[60] See U.S. Government Accountability Office, GAO–12–326: ''Private Pensions: Better Agency Coordination Could Help Small Employers Address Challenges to Plan Sponsorship'' (March 2012) at 18–19. (*https://www.gao.gov/products/GAO-12-326*).

[61] Employee Benefit Research Institute, ''Low Worker Take Up of Workplace Benefits May Impact Financial Wellbeing'' (April 10, 2018).

[62] The Pew Charitable Trusts, ''Employer Barriers to and Motivations for Offering Retirement Benefits,'' 2017.

[63] Amy E. Knaup and Merissa C. Piazza, ''Business Employment Dynamics data: survival and longevity, II,'' Monthly Labor Review (Sept. 2007).

[64] The Pew Charitable Trusts, ''Employer Barriers to and Motivations for Offering Retirement Benefits,'' 2017.

[65] Note that ERISA regulations exempt small plans, generally those with under 100 participants, from the audit requirement if they meet certain conditions. 29 CFR 2520.104–46. In 2015, more than 99 percent of small defined contribution pension plans that filed the Form 5500 or the Form 5500–SF did not attach an audit report.

[66] ERISA section 412 and related regulations (29 CFR 2550.412–1 and 29 CFR part 2580) generally require every fiduciary of an employee benefit plan and every person who handles funds or other property of such plan to be bonded. ERISA's bonding requirements are intended to protect employee benefit plans from risk of loss due to fraud or dishonesty on the part of persons who handle plan funds or other property. ERISA refers to persons who handle funds or other property of an employee benefit plan as plan officials. A plan official must be bonded for at least 10% of the amount of funds he or she handles, subject to a minimum bond amount of $1,000 per plan with respect to which the plan official has handling functions. In most instances, the maximum bond amount that can be required under ERISA with respect to any one plan official is $500,000 per plan; however, the maximum required bond amount is $1,000,000 for plan officials of plans that hold employer securities.

''Strengthening Retirement Security in America,'' stating that ''[i]t shall be the policy of the Federal Government to promote programs that enhance retirement security and expand access to workplace retirement savings plans for American workers.'' The Executive Order directed the Secretary of Labor to examine policies that would: (1) Clarify and expand the circumstances under which United States employers, especially small and mid-sized businesses, may sponsor or participate in a MEP as a workplace retirement savings option offered to their employees, subject to appropriate safeguards; and (2) increase retirement security for part-time workers, sole proprietors, working owners, and other entrepreneurial workers with non-traditional employer-employee relationships by expanding their access to workplace retirement savings plans, including MEPs. The Executive Order further directed, to the extent permitted by law and supported by sound policy, that the Department consider within 180 days of the date of the Executive Order whether to issue a notice of proposed rulemaking, other guidance, or both, that would clarify when a group or association of employers, or other appropriate business or organization could be an ''employer'' within the meaning of ERISA section 3(5).

In response to the Executive Order, the Department has conducted a thorough review of its current policies regarding MEPs and determined that its existing interpretive position is unnecessarily narrow. The Department has concluded that regulatory action is appropriate to establish greater flexibility in the regulatory standards governing the criteria that must exist in order for an employer group or association or PEO to sponsor a MEP.

The proposed rule generally would provide this flexibility by making five important changes to the Department's prior subregulatory guidance. First, it would clarify the existing requirement in prior subregulatory guidance that bona fide groups or associations must have at least one substantial business purpose unrelated to the provision of benefits. Second, it would relax the requirement that group or association members share a common interest, as long as they operate in a common geographic area. Third, it would make clear that groups or associations whose members operate in the same industry could sponsor MEPs, regardless of geographic distribution. Fourth, it would clarify that working owners without employees are eligible to participate in MEPs sponsored by bona fide employer groups or associations that meet the requirements of the proposal. Fifth, it would establish criteria under which ''bona fide'' PEOs may sponsor MEPs covering the employees of their client employers.

The proposed criteria also result in more MEPs being treated consistently under the Code and title I of ERISA, and such consistency could remove another barrier inhibiting the broader establishment of MEPs. As discussed earlier in this preamble, a retirement plan covering employees of multiple employers that satisfies the requirements of IRC section 413(c) is considered a single plan under IRC section 413(c), which addresses the tax-qualified status of MEPs. Moreover, in Revenue Procedure 2002–21, 2002–1 C.B. 911, the IRS issued guidance that provided an avenue for PEOs to administer a MEP for the benefit of worksite employees of client organizations and not violate the exclusive benefit rule.[67]

By establishing greater flexibility in the standards and criteria for sponsoring MEPs than previously articulated in subregulatory interpretive rulings under ERISA section 3(5), the proposed regulation would facilitate the adoption and administration of MEPs and expand access to, and lower the cost of, workplace retirement savings plans, especially for employees of small employers and certain self-employed individuals. At the same time, reflecting the position taken in its subregulatory guidance, the Department intends that the conditions included in the proposed regulation would continue to distinguish plans sponsored by entities that satisfy ERISA's definition of ''employer'' from arrangements or services offered by other entities.

4. Affected Entities

If finalized, the proposed rule may encourage both the creation of new MEPs and the expansion of existing MEPs. In order to determine the entities that this proposal would affect and its effects on those entities, the Department has reviewed the characteristics of existing MEPs that file Forms 5500.[68] As explained below, however, the information available on the Form 5500 includes both defined contribution and defined benefit MEPs. This proposed rule is limited to defined contribution pension plans and this document generally refers only to defined contribution MEPs (DC MEPs) when referring to ''MEPs.'' Because they are part of the multiple employer pension plan filing population, defined benefit MEPs are included in the discussion below to understand the universe of MEPs filing the form. This section uses the terms DC MEPs and DB MEPs to differentiate the types of plans that currently file Forms 5500.

Currently DC MEPs comprise only a small share of the private sector retirement system, as shown in Table 2.[69] Based on the latest available data, about 4,592 DC MEPs exist with approximately 5.1 million total participants, 4.1 million of whom are active participants. DC MEPs hold about $232 billion in assets.[70]

TABLE 2—CURRENT STATISTICS ON MEPS

	Number of MEPs	Total participants	Active participants	Total assets
MEP DC Plans	4,592	5.1 million	4.1 million	$232 billion.

[67] See Internal Revenue Code (IRC) section 413(c)(2) and § 1.413–2(c) of the Income Tax Regulations, which provide that, in determining whether a MEP is for the exclusive benefit of its employees (and their beneficiaries), all employees participating in the plan are treated as employees of each such employer. IRC sections 413(c)(1) and (3) provide that IRC sections 410(a) (participation) and 411 (minimum vesting standards) also are applied as if all employees of each of the employers who maintain the plan were employed by a single employer. Under Treas. Reg. § 1.413–2(a)(2), a plan is subject to the requirements of IRC section 413(c) if it is a single plan and the plan is maintained by more than one employer.

See generally Treas. Reg. §§ 1.413–1(a)(2),1.413–2(a)(2), and 1.414(l)–1(b)(1). However, the minimum coverage requirements of IRC section 410(b) and related nondiscrimination requirements are generally applied to a MEP on an employer-by-employer basis.

[68] ''Forms 5500'' refers collectively to the Form 5500 (Annual Return/Report of Employee Benefit Plan) and the Form 5500–SF (Annual Return/Report of Small Employee Benefit Plan).

[69] EBSA performed these calculations using the 2015 Research File of Form 5500 filings. The estimates are weighted and rounded, which means they may not sum precisely. The Department derived these estimates by identifying plans that indicated ''multiple employer plan'' status on the Form 5500 Part 1 Line A. Then, the Department removed nine plans that upon further review appear to be multiemployer plans.

[70] *Id.*

TABLE 2—CURRENT STATISTICS ON MEPS—Continued

	Number of MEPs	Total participants	Active participants	Total assets
As a share of all ERISA DC plans	0.7%	5.3%	5.3%	4.4%.
MEP DC Plans	4,592	5.1 million	4.1 million	$232 billion.
401(k) Plans	4,345	4.8 million	3.9 million	$216 billion.
Other DC Plans	248	0.4 million	0.3 million	$15 billion.
MEP DC Plans	4,592	5.1 million	4.1 million	$232 billion.
MEP DB Plans	242	1.5 million	0.6 million	$132 billion.
Total MEP Plans	4,834	6.6 million	4.7 million	$363 billion.

Source: EBSA performed these calculations using the 2015 Research File of Form 5500 filings. The estimates are weighted and rounded, which means they may not sum precisely. The Department derived these estimates by identifying plans that indicated ''multiple employer plan'' status on the Form 5500 Part 1 Line A. Then, the Department removed nine plans that upon further review appear to be multiemployer plans.

Some MEPs are very large; 59 percent of total participants are in MEPs with 10,000 or more participants.[71] Furthermore, 98 percent of total participants are in MEPs with 100 or more participants. There are 47 MEPs holding over $1 billion in assets each.[72] In existing DC MEPs, 91.6 percent of participants direct all of the investments, another 5.6 percent direct the investment of a portion of the assets, and the remainder did not direct the investment of any of the assets.[73]

There are caveats to keep in mind when interpreting the data presented in Table 2 above. For example, under the Department's prior subregulatory guidance, some plans established and maintained by groups of employers that might meet the conditions of the proposed rule, would currently be deemed to be individual plans sponsored by each of the employers in the group. In these circumstances, each participating employer is required to file a Form 5500 just as it would if it established its own plan. These filings are indistinguishable from typical single-employer plans and do not appear in the data set as identifiable multiple employer plans.[74]

As stated earlier in this preamble, PEOs generally are entities that enter into agreements with client employers to provide certain employment responsibilities, such as tax withholding, to the individuals who perform services for the client employers. At the end of 2017, there were 907 PEOs operating in the United States, providing services to 175,000 client employers with 3.7 million employees.[75] The proposed rule would allow certain PEOs meeting the requirements of paragraph (c) to sponsor MEPs and offer coverage to their client employers' employees.

This proposal would benefit many workers that might otherwise tend to lack access to high-quality, affordable, on-the-job retirement savings opportunities. These workers include self-employed individuals, sole proprietors without employees, participants in the ''gig'' economy, ''contingent'' workers, and workers in various ''alternative'' work arrangements. Although there are other retirement savings vehicles available to these workers, the workers in these categories are less likely to access and participate in retirement plans. For example, only six percent of self-employed individuals participated in retirement plans in 2013.[76] Among contingent workers, only 23 percent were eligible to participate in employer-provided retirement plans in 2017.[77] The proposal would provide many of these workers with a new opportunity to access a retirement plan by joining a MEP. Approximately 8 million self-employed workers between ages 21 and 70, representing 6 percent of all similarly aged workers, have no employees and usually work at least 20 hours per week, and under this proposal would become eligible to join MEPs.[78] These workers are involved in a wide range of occupations: l\Lawyers, doctors, real estate agents, childcare providers, as well as ''gig economy'' workers, who provide on-demand services, often through online intermediaries, such as ride-sharing online platforms. In many respects, the self-employed are quite different from employees in a traditional employer-employee arrangement. For example, self-employed persons often have complex work arrangements—they are more likely to work part-time or hold multiple jobs.[79]

Gig economy workers, in particular, may face obstacles to saving for retirement. While a number of tax-preferred retirement savings vehicles are already available to them, many might find it difficult and expensive to navigate these options on their own.[80] Relatively few gig workers have access to employer-sponsored retirement plans,

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] In addition, there are some plans that are erroneously indicating that they are ''multiple employer plans'' rather than ''single-employer plans'' under title I of ERISA. These plans may in fact be group or association or PEO-type MEPs that do not meet the conditions of the prior DOL subregulatory guidance. This distorts the database and leads to inaccurate estimates. In particular, the high number of plans erroneously reporting that they are MEPs likely overestimates the number of existing MEPs for purposes of title I of ERISA and underestimates the average size of MEPs.

[75] Laurie Bassi and Dan McMurrer, ''An Economic Analysis: The PEO Industry Footprint in 2018,'' National Association of Professional Employer Organizations, September 2018, available at *https://www.napeo.org/docs/default-source/white-papers/2018-white-paper-final.pdf?sfvrsn=6.*

[76] Craig Copeland, ''Employment-Based Retirement Plan Participation: Geographic Differences and Trends, 2013,'' *EBRI Issue* Brief, no. 405, October 2014. In this report, the self-employed include mostly unincorporated self-employed.

[77] Bureau of Labor Statistics, ''Contingent and Alternative Employment Arrangements—May 2017,'' June 7, 2018.

[78] DOL tabulations of the June 2018 Current Population Survey basic monthly data.

[79] For tax administrative data, see Emilie Jackson, Adam Looney, and Shanthi Ramnath, ''The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage.'' U.S. Department of Treasury, Office of Tax Analysis, Working Paper 114 (January 2017). For survey data, see the Survey of Business Owners and Self-Employed Persons, 2012 from the Census Bureau at *https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=SBO_2012_00CSCBO04&prodType=table.*

[80] For related information see, for example, Jonathan Kahler, ''Retirement planning in a 'gig economy','' Vanguard, June 13, 2018, available at *https://vanguardblog.com/2018/06/13/retirement-planning-in-a-gig-economy/,* which explains that a gig worker is ''running your own HR department and you're the benefits manager, which means taking sole responsibility for your retirement.''

one survey found.[81] According to another survey, many traditional workers who pursue gig work on the side do so at least partly to help them save more for retirement. On the other hand, most of those for whom gig work is their main job have less than $1,000 set aside for retirement.[82] MEPs could help raise awareness and ease entry to retirement coverage for broad classes of gig workers such as on-demand drivers or workers in cities where gig work is common.

According to the May 2017 Contingent Worker Supplement survey, 3.8 percent of workers identified themselves as ''contingent'' workers,[83] meaning they did not expect their jobs to last or reported that their jobs were temporary. About 10 percent of workers fell under ''alternative,'' non-traditional work arrangements that include independent contractors, on-call workers, temporary help agency workers, and workers provided by contract firms.[84] The group of contingent workers and the group of workers in alternative arrangements overlap. Using a different survey, Katz and Krueger, found that the share of workers in alternative arrangements was approximately 15.8 percent in 2015.[85]

Policymakers have expressed concern about whether some gig workers, and, more generally self-employed persons, have access to retirement plans and adequately save for retirement. According to the Contingent Worker Survey, in 2017, 23 percent of contingent workers were eligible to participate in employer provided retirement plans, which is substantially lower than the corresponding 48 percent figure for non-contingent workers. Workers in alternative arrangements (13 percent for temporary help agency workers, 35 percent for on-call workers, and 48 percent for workers provided by contract firms) were less likely than workers with traditional arrangements (51 percent) to be eligible for employer-provided retirement plans.[86] Thus, by allowing the self-employed to participate in MEPs, the proposal would increase retirement plan access for them.

5. Benefits

a. Expanded Access to Coverage

Generally, employees rarely choose to save for retirement outside of the workplace, despite having options to save in tax-favored savings vehicles, such as investing either in traditional IRAs or Roth IRAs. Thus, the availability of workplace retirement plans is a significant factor affecting whether workers save for their retirement. Yet, despite the advantages of workplace retirement plans, access to such plans for employees of small businesses is relatively low. The proposal's expansion of access to certain MEPs would enable groups of private-sector employers to participate in a collective retirement plan and provide employers with another efficient way to reduce some costs of offering workplace retirement plans. Thereby, more plan formation and broader availability of such plans would occur, especially among small employers.

The MEP structure could address significant concerns from employers about the costs to set up and administer retirement benefit plans. In order to participate in a MEP, employers generally would be required to execute a participation agreement or similar instrument setting forth the rights and obligations of the MEP and participating employers. These employers would then be participating in a single plan, rather than sponsoring their own separate, individual ERISA-covered plan; therefore the employer group or association or PEO would be acting as the ''employer'' sponsoring the MEP within the meaning of section 3(5) of ERISA. That employer group or association typically, or in the case of PEOs always, would assume the roles of plan administrator and named fiduciary. The individual employers would not be directly responsible for the MEP's overall compliance with ERISA's reporting and disclosure obligations. Accordingly, the MEP structure could address small employers' concerns regarding the cost associated with fiduciary liability of sponsoring a retirement plan by effectively transferring much of the legal risks and responsibilities to professional fiduciaries who would be responsible for managing plan assets and selecting investment menu options, among other things. Participating employers' continuing involvement in the day-to-day operations and administration of their MEP generally could be limited to enrolling employees and forwarding voluntary employee and employer contributions to the plan. Thus, participating employers could keep more of their day-to-day focus on managing their businesses, rather than their pension plans.

Congress has repeatedly enacted legislation intended to lower costs, simplify requirements, and ease administrative burdens for small employers to sponsor retirement plans. For example, the Revenue Act of 1978 [87] and the Small Business Job Protection Act of 1996 [88] established the SEP IRA plan and the SIMPLE IRA plan, respectively, featuring fewer compliance requirements than other plan types. The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) [89] included provisions that are intended to increase access to retirement plans for small businesses by: (1) Eliminating top-heavy testing requirements for safe harbor 401(k) plans; (2) increasing contribution limits for employer-sponsored IRA plans and 401(k) plans; and (3) creating tax credits for small employers to offset new plan startup costs and for individuals within certain income limits who make eligible contributions to retirement plans. Despite these legislative efforts to increase access to retirement savings plans for small employers, as shown in Table 1, above, the percentage of the U.S. workforce participating in a workplace retirement plan remains around 50 percent. Therefore, a critical question is whether MEPs meeting the requirements of the proposal can increase access to workplace retirement plans when other initiatives have had limited effect. Several factors indicate to the Department that they can.

First, the Department believes that employers may be more likely to participate in a MEP sponsored by a PEO, group, or association of employers with which they have a pre-existing relationship based on trust, familiarity, and efficiency stemming from that relationship. For example, a PEO that performs payroll or human resources

[81] ''Gig Workers in America: Profiles, Mindsets, and Financial Wellness,'' Prudential, 2017, available at *http://research.prudential.com/documents/rp/Gig_Economy_Whitepaper.pdf.*

[82] ''Gig Economy and the Future of Retirement,'' Betterment, 2018, available at *https://www.betterment.com/wp-content/uploads/2018/05/The-Gig-Economy-Freelancing-and-Retirement-Betterment-Survey-2018_edited.pdf.* This same survey found, however, that most gig workers are paying off debt. It is sometimes better to retire debt before saving aggressively for retirement.

[83] U.S. Bureau of Labor Statistics, ''Contingent and Alternative Employment Arrangements—May 2017'' (June 7, 2018).

[84] *Id.*

[85] Lawrence F. Katz & Alan B. Krueger, ''The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015,'' (June 18, 2017). This survey has a smaller sample size than the Contingent Worker Survey conducted by the Bureau of Labor Statistics.

[86] The self-employed—both incorporated and unincorporated—and the independent contractors were excluded from calculating these percentages. *See* U.S. Bureau of Labor Statistics, ''Contingent and Alternative Employment Arrangements—May 2017'' (2018).

[87] Public Law 95–600, sec. 152, 92 Stat. 2763, 2791.

[88] Public Law 104–188, sec. 1421, 110 Stat. 1755, 1792.

[89] Public Law 107–16, 115 Stat. 38.

services for an employer would have connected information technology infrastructures that would facilitate efficient transfers of employee and employer contributions. Similarly, small employers obtaining health insurance coverage through an AHP sponsored by a group or association may find it convenient and cost effective to establish retirement plans offered by the same group or association. In many cases, the group or association and small employers may link their information technology systems to collect health care premiums from participating employers,[90] and that infrastructure could also be used to collect retirement contributions, resulting in IT-related start-up costs savings. In addition, small employers' and self-employed individuals may encounter fewer administrative burdens if the same group or association administers both their health and retirement plans.

Second, employers may be incentivized to sponsor these plans based on cost savings that may occur when payroll services are integrated with retirement plan record-keeping systems. Several firms in the market already provide payroll services and plan record-keeping services particularly tailored to small employers.[91] These firms can afford to provide these integrated services at a competitive price, suggesting that integrating these services could lead to some efficiency gains. Since PEOs already provide payroll services to client employers, a MEP sponsored by a PEO can reap the benefits of integrating these services, which can in turn benefit participating employers through lower fees and ease of administration. According to a survey of small employers, those with outsourced payroll systems are twice as likely to begin offering a retirement plan in the next two years as those that handle their payroll internally.[92] This may be evidence of causation: Outsourcing payroll may encourage employers to offer retirement plans because it makes such offering less costly, as some of the information technology infrastructure necessary to maintain a retirement plan already is in place. On the other hand, this might be mere correlation, wherein small employers generating steady revenue streams are more likely to outsource payroll systems and also more likely to sponsor retirement plans in the near future because they are generally more financially secure.

As further discussed in the uncertainty section below, the Department does not have sufficient data to determine precisely the likely extent of participation by small employers and the self-employed in MEPs under the proposal. However, overall, the Department believes that the proposed rule would provide a new valuable option for small employers and the self-employed to adopt retirement savings plans for their employees, which could increase access to retirement plans for many American workers.

b. Reduced Fees and Administration Savings

Many MEPs would benefit from scale advantages that small businesses do not currently enjoy, and MEPs would pass some of the attendant savings onto participating employers and participants.[93] Grouping small employers together into a MEP could facilitate savings through administrative efficiencies (economies of scale) and sometimes through price negotiation (market power). The degree of potential savings may be different for different types of administrative functions. For example, scale efficiencies can be very large with respect to asset management, and may be smaller, but still meaningful, with respect to recordkeeping.

Large scale may create two distinct economic advantages for MEPs. First, as scale increases, marginal costs for MEPs would diminish, and MEPs would spread fixed costs over a larger pool of member employers and employee participants, creating direct economic efficiencies. Second, larger scale may increase the negotiating power of MEPs. Negotiating power matters when competition among financial services providers is less than perfect and they can command greater profits than in an environment with perfect competition. Very large plans may sometimes exercise their own market power to negotiate lower prices, translating what would have been higher revenue for financial services providers into savings for member employers and employee participants.

There may be times when scale efficiencies would not translate into savings for small employer members and their employee participants because regulatory requirements applicable to large MEPs may be more stringent than those applicable to most separate small plans. For example, some small plans are exempt from annual reporting requirements, and many others are subject to more streamlined reporting requirements than larger plans.

But in most cases, the savings from scale efficiency of MEPs would be larger than the savings from scale efficiencies that other providers of bundled financial services could offer to small employers. First, the market position of MEPs would sometimes provide them with relative advantages over other providers of bundled financial services. For example, existing groups, associations, or PEOs that have multi-purpose relationships with small employers may enjoy lower marginal costs for marketing, distributing, and administering defined benefit plans through MEPs with their member employers than other providers of bundled financial services enjoy. Second, the legal status of MEPs as a single large plan may streamline certain regulatory burdens. For example, a MEP can file a single annual return/report and obtain a single bond in lieu of the multiple reports and bonds necessary when other providers of bundled financial services administer many separate plans.

Relative to separate small employer plans, MEPs operating as a large single plan would likely secure substantially lower prices from financial services companies. Asset managers commonly offer proportionately lower prices, relative to assets invested, to larger investors, under so-called tiered pricing practices. For example, investment companies often offer lower-priced mutual fund share classes to customers whose investments in a fund surpass specified break points.[94] These lower

[90] In the analogous context of health plans, the Department recently issued a final regulation that enhances the ability of unrelated employers to band together to provide health benefits through a single ERISA-covered plan called an AHP. The AHP Rule, which was issued on June 21, 2018, expands access to more affordable, quality health care by amending the definition of "employer" under section 3(5) of ERISA for AHPs. Similar to this proposal, the AHP Rule established alternative criteria under ERISA's section 3(5) definition of employer to permit more groups or associations of employers to establish a multiple employer group health plan that is a single employee welfare benefit plan within the meaning of ERISA section 3(1) of ERISA.

[91] Cerulli Associates, *U.S. Retirement Markets 2016* (available at *https://www.cerulli.com/vapi/public/getcerullifile?filecid=Cerulli-US-Retirement-Markets-2016-Information-Packet*).

[92] The Pew Charitable Trusts, "Employer Barriers to and Motivations for Offering Retirement Benefits," 2017.

[93] *See, e.g.,* BlackRock, "Expanding Access to Retirement Savings for Small Business," *Viewpoint* (Nov. 2015).

[94] Sarah Holden, James Duvall, and Elena Barone Chism, "The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2017," *ICI Research Perspective* 24: no. 4 (June 2018) (concluding that 401(k) mutual fund investors pay lower expense ratios for a number or reasons, including "market discipline" imposed by performance- and cost-

Continued

prices may reflect scale economies in any or all aspects of administering larger accounts, such as marketing, distribution, asset management, recordkeeping, and transaction processing. Large MEPs would likely qualify for lower pricing compared with separate plans of small employers. MEP participants that benefit from lower asset-based fees would enjoy superior investment returns net of fees.

The availability and magnitude of scale efficiencies may be different with respect to different retirement plan services. For example, asset management generally enjoys very large-scale efficiencies. Investors of all kinds generally benefit by investing in large co-mingled pools. Even within large pools, however, small investors often pay higher prices than larger ones. Mutual funds often charge lower ''asset management'' fees for larger investors, in both retail and institutional markets. The Department invites comments on the degree to which large MEPs would provide small employers with scale advantages in asset management larger than those provided by other large pooled asset management vehicles, such as mutual funds, available to separate small plans.

As with asset management, scale efficiencies often are available with respect to other plan services. For example, the marginal costs for services such as marketing and distribution, account administration, and transaction processing often decrease as customer size increases. MEPs, as large customers, may enjoy scale efficiencies in the acquisition of such services. It is also possible, however, that the cost to MEPs of servicing their small employer-members may diminish or even offset such efficiencies. Stated differently, MEPs scale efficiencies may not always exceed the scale efficiencies from other providers of bundled financial services used by small employers that sponsor separate plans. For example, small pension plans sometimes incur high distribution costs, reflecting commissions paid to agents and brokers who sell investment products to plans. MEPs, unlike large single-employer plans, must themselves incur some cost to distribute retirement plans to large numbers of small businesses. But relative to traditional agents and brokers, MEPs could reduce costs if they are able to take economic advantage of members' existing ties to a sponsoring group or association of employers or PEO. This can be a more efficient business model than sending out brokers and investment advisers to reach out to small businesses one-by-one, which could result in lower administrative fees for plan sponsors and participants.

For much the same reason, MEPs sponsored by pre-existing groups or associations of employers that perform multiple functions for their members other than offering retirement coverage (such as chambers of commerce or trade associations) and PEOs might have more potential to deliver administrative savings than those established for the principal purpose of offering retirement coverage. These existing organizations may already have extensive memberships and relationships with small employers; thus, they may have fewer setup, recruitment, and enrollment costs than organizations newly formed to offer retirement benefits. These existing organizations may currently be limited in their ability to offer MEPs to some or all of their existing members and clients (for example, to working owners, workers outside of a common industry, or employers contracting with PEOs) by the Department's prior subregulatory guidance. Under the requirements of this proposed rule, they could newly provide such members and clients with access to MEPs.

All of this suggests that many MEPs will enjoy scale efficiencies greater than the scale efficiencies available from other providers of bundled financial services. However, the scale efficiencies of MEPs would still likely be smaller than the scale efficiencies enjoyed by very large single-employer plans. The Department invites comments on the nature, magnitude, and determinants of MEPs' potential scale advantages, and on the conditions under which MEPs will pass more or less of the attendant savings to different participating employers.

By enabling MEPs to comprise otherwise unrelated small employers and self-employed individuals (1) who are in the same trade, industry, line of business, or profession; or (2) have a principal place of business with a region that does not exceed the boundaries of the same State or metropolitan area (even if the area includes more than one State), this proposed rule would allow more MEPs to be established and to claim a significant market presence and thereby pursue scale advantages. Consequently, this proposal would extend scale advantages to some MEPs that otherwise might have been too small to achieve them and to small employers and working owners that absent the proposal would have offered separate plans (or no plans) but that under this proposal may join large MEPs.

While MEPs' scale advantages may be smaller than the scale advantages enjoyed by very large single-employer plans, it nonetheless is illuminating to consider the deep savings historically enjoyed by the latter. Table 3 shows how much investment fees vary based on the amount of assets in a 401(k) plan.[95] The table focuses on mutual funds, which are the most common investment vehicle in 401(k) plans, and shows that the average expense ratio for several dominant types of mutual funds is much lower for large plans than for smaller plans. And this data shows the fees actually paid, rather than the lowest fees available to a plan. It is unclear what features and quality aspects accompanied the fees.

TABLE 3—AVERAGE EXPENSE RATIOS OF MUTUAL FUNDS IN 401(K) PLANS IN BASIS POINTS, 2015

Plan assets	Domestic equity mutual funds	International equity mutual funds	Domestic bond mutual funds	International bond mutual funds	Target date mutual funds	Balanced mutual funds (non-target date)
$1M–$10M	81	101	72	85	79	80
$10M–$50M	68	85	59	77	68	64

conscious plan sponsors). *See also* Russel Kinnel, ''Mutual Fund Expense Ratio Trends,'' Morningstar, (June 2014), at *https://corporate.morningstar.com/us/documents/researchpapers/fee_trend.pdf* (accessed Aug. 21, 2018) (stating that breakpoints are built into mutual fund management fees so that a fund charges less for each additional dollar managed); Vanguard, ''What You Should Know About Mutual Fund Share Classes and Breakpoints,'' at *http://www.vanguard.com/pdf/v415.pdf* (stating that investors in certain class shares may be eligible for volume discounts if their purchases meet certain investment levels, or breakpoints).

[95] Average expense ratios are expressed in basis points and asset-weighted. The sample includes plans with audited 401(k) filings in the BrightScope database for 2015 and comprises 15,110 plans with $1.4 trillion in mutual fund assets. Plans were included if they had at least $1 million in assets and between 4 and 100 investment options. BrightScope/ICI, ''The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans, 2015'' (March 2018).

TABLE 3—AVERAGE EXPENSE RATIOS OF MUTUAL FUNDS IN 401(K) PLANS IN BASIS POINTS, 2015—Continued

Plan assets	Domestic equity mutual funds	International equity mutual funds	Domestic bond mutual funds	International bond mutual funds	Target date mutual funds	Balanced mutual funds (non-target date)
$50M–$100M	55	72	44	66	54	50
$100M–$250M	52	68	40	64	55	45
$250M–$500M	49	63	36	67	50	42
$500M–$1B	45	60	33	65	50	39
More than $1B	36	52	26	65	48	32

Source: Average expense ratios are expressed in basis points and asset-weighted. The sample includes plans with audited 401(k) filings in the BrightScope database for 2015 and comprises 15,110 plans with $1.4 trillion in mutual fund assets. Plans were included if they had at least $1 million in assets and between 4 and 100 investment options. BrightScope/ICI, ''The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans, 2015'' (March 2018).

There are some important caveats to interpreting Table 3. The first is that it does not include data for most of the smallest plans because plans with fewer than 100 participants generally are not required to submit audited financial statements with their Forms 5500. The second is that there is variation across plans in whether and to what degree the cost of recordkeeping is included in the mutual fund expense ratios paid by participants. In plans where recordkeeping is not entirely included in the expense ratios, it may be paid by employers, as a per-participant fee, or as some combination of these. These caveats mean that the link between fees and size could be either stronger or weaker than Table 3 suggests, creating some uncertainty about how large an advantage MEPs could offer.

An alternative method of comparing potential size advantages is a broader measure called ''total plan cost'' calculated by Brightscope.[96] Total plan cost likely provides a better way to compare costs because, in addition to costs paid in the form of expense ratios, it includes fees reported on the audited Form 5500. It comprises all costs regardless of whether they are paid by the plan, the employer, or the participants. Total plan cost includes recordkeeping services for all plans, for example, which is one reason that it is a more comparable measure than the data presented above in Table 3. When plans invest in mutual funds and similar products, BrightScope uses expense data from Lipper, a financial services firm. When plans invest in collective investment trusts and pooled separate accounts, BrightScope generates an estimate of the investment fees.

Using total plan cost yields generally very similar results about the cost differences facing small and large plans. Table 4 shows that very few of the smaller plans are enjoying the low fees that are commonplace among larger plans.[97]

TABLE 4—LARGER PLANS TEND TO HAVE LOWER FEES OVERALL

Plan assets	Total plan cost (in basis points)		
	10th percentile	Median	90th percentile
$1M–$10M	75	111	162
$10M–$50M	61	91	129
$50M–$100M	37	65	93
$100M–$250M	22	54	74
$250M–$500M	21	48	66
$500M–$1B	21	43	59
More than $1B	14	27	51

Source: Data is plan-weighted. The sample is plans with audited 401(k) filings in the BrightScope database for 2015, which comprises 18,853 plans with $3.2 trillion in assets. Plans were included if they had at least $1 million in assets and between 4 and 100 investment options. BrightScope/ICI, ''The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans, 2015'' (March 2018).

Deloitte Consulting LLP, for the Investment Company Institute, conducted a survey of 361 defined contribution plans. The study calculates an ''all-in'' fee that is comparable across plans. It includes both administrative and investment fees paid by both the plan and the participant. Generally, small plans with 10 participants are paying approximately 50 basis points more than plans with 1,000 participants.[98] Small plans with 10 participants are paying about 90 basis points more than large plans with 50,000 participants. Deloitte predicted these estimates by analyzing the survey results using a regression approach, calculating basis points as a share of assets.

These research findings have shown that small plans and their participants generally pay higher fees than large plans and their participants. Because this rule would give many small employers the opportunity to join a MEP, some of which are very large plans, then many of these employers would likely incur lower fees. Many employers that are not currently offering any retirement plan may join a MEP, leading their employees to save for retirement. Many employers already sponsoring a retirement plan might

[96] *Id.*

[97] *Id.* Data is plan-weighted. The sample is plans with audited 401(k) filings in the BrightScope database for 2015, which comprises 18,853 plans with $3.2 trillion in assets. Plans were included if they had at least $1 million in assets and between 4 and 100 investment options.

[98] Deloitte Consulting and Investment Company Institute, ''Inside the Structure of Defined Contribution/401(k) Plan Fees, 2013: A Study Assessing the Mechanics of the 'All-in' Fee'' (Aug. 2014).

decide to join a MEP instead, seeking lower fees and reduced fiduciary liability exposure. If there indeed are lower fees in the MEPs than in their previous plans, those lower fees could translate into higher savings.

c. Reporting and Audit Cost Savings

The potential for MEPs to enjoy reporting cost savings merits separate attention because this potential is shaped by not only economic forces, but also the reporting requirements applicable to different plans. On the one hand, a MEP, as a single plan, can file a single report and conduct a single audit, while separate plans may be required to file separate reports and conduct separate audits. On the other hand, a MEP, as a large plan, is generally subject to more stringent reporting and audit requirements than a small plan, which likely files no or streamlined reports and undergoes no audits. With respect to reporting and audits then, MEPs sometimes may offer more savings to medium-sized employers (with more than 100 retirement plan participants) already subject to more stringent reporting and audit requirements than to small employers. Small employers that otherwise would have fallen outside of reporting and audit requirements sometimes might incur slightly higher costs by joining MEPs, though this increase is likely to be offset by other sources of MEP savings and by improved security and availability of data that might derive from MEPs' reporting and audits.

Sponsors of ERISA-covered retirement plans generally must file a Form 5500, with all required schedules and attachments annually. The cost burden incurred to satisfy the Form 5500 related reporting requirements varies by plan type, size, and complexity. Analyzing the 2015 Form 5500 filings, the Department estimates that the average cost to file the Form 5500 is as follows: $276 per filer for small (generally less than 100 plan participants) single-employer DC plans eligible for Form 5500–SF; $437 per filer for small single-employer DC plans *not* eligible to file Form 5500–SF; and $1,685 per filer for large (generally 100 participants or more) single-employer DC plans, plus the cost of an audit.

Additional schedules and reporting may be required for large and complex plans. For example, large retirement plans are required to attach auditor's reports with Form 5500. Most small plans are not required to attach such reports.[99] Hiring an auditor and obtaining an audit report can be costly for plans, and audit fees may increase as plans get larger or if plans are more complex. Some recent reports state that the fee to audit a 401(k) plan ranges between $6,500 and $13,000.[100]

If an employer joins a MEP meeting the requirements of the proposal, it can save some costs associated with filing Form 5500 and fulfilling audit requirements because a MEP is considered a single plan. Thus, one Form 5500 and audit report would satisfy the reporting requirements, and each participating employer would not need to file its own, separate Form 5500 and, for large plans or those few small plans that do not meet the small plan audit waiver, an audit report. According to a GAO report, most association MEPs interviewed by the GAO have over 100 participating employers.[101] PEOs also tend to have a large number of client employers, at least 400 participating employers in their PEO-sponsored DC plans.[102] Assuming reporting costs are shared by participating employers within a MEP, an employer joining a MEP can save virtually all the reporting costs discussed above. As PEOs seem to have more participating employers than associations, an employer sometimes might save slightly more by joining a PEO MEP compared to joining a group or association MEP, but the additional savings are minimal.[103] Large plans could enjoy even higher cost savings if audit costs are taken into account. The Department estimates that reporting cost savings associated with Form 5500 and an audit report would be approximately $8,103 per year for a large plan joining an association MEP and $8,165 per year for a large plan joining a PEO MEP.[104]

It is less clear whether the self-employed would experience similar reporting cost savings by joining a MEP. The Department estimates these potential cost savings by comparing the reporting costs of an employer that participates in a MEP rather than sponsoring its own plan. But as discussed earlier, several retirement savings options are already available for self-employed persons, and most have minimal or no reporting requirements. For example, both SEP IRA and SIMPLE IRA plans are available for small employers and the self-employed, and neither option requires Form 5500 filings.[105] Solo 401(k) plans are also available to the self-employed persons, and they may be exempt from Form 5500–EZ reporting requirement if the plans assets are less than $250,000.[106] Thus, if self-employed individuals join a MEP, they would be unlikely to realize reporting costs savings. In fact, it is possible that their reporting costs could slightly increase, because the self-employed would share reporting costs with other MEP participating employers that they otherwise would not incur.

d. Reduced Bonding Costs

The potential for bonding cost savings in MEPs merits separate attention. As noted above, ERISA section 412 and related regulations[107] generally require every fiduciary of an employee benefit plan and every person who handles funds or other property of such plan to be bonded. ERISA's bonding requirements are intended to protect employee benefit plans from risk of loss due to fraud or dishonesty on the part

[99] Under certain circumstances, some small plans may still need to attach auditor's reports. For more details, see *https://www.dol.gov/sites/default/files/ebsa/employers-and-advisers/plan-administration-and-compliance/reporting-and-filing/form-5500/2017-instructions.pdf.* In 2015, approximately 3,600 small plans that filed the Form 5500 and not the Form 5500–SF submitted audit reports as part of their Form 5500 filing.

[100] *See https://www.thayerpartnersllc.com/blog/the-hidden-costs-of-a-401k-audit.*

[101] U.S. Government Accountability Office, GAO–12–665, ''Federal Agencies Should Collect Data and Coordinate Oversight of Multiple Employer Plans,'' (Sept. 2012) (*https://www.gao.gov/products/GAO-12-665*).

[102] *Id.*

[103] Cost savings for small single employer DC plans eligible for Form 5500–SF would be $259.51 per filer if it joins an association-sponsored MEP as opposed to $272.15 per filer if it joins a PEO-sponsored MEP; for small single employer DC plans *not* eligible for Form 5500–SF cost savings would be $420.31 per filer if it joins an association-sponsored MEP as opposed to $432.94 per filer if it joins a PEO-sponsored MEP; for large single employer DC plans cost savings would be $1,668.36 per filer if it joins an association-sponsored MEP as opposed to $1,681.00 per filer if it joins a PEO-sponsored MEP.

[104] The Department conservatively estimated these cost savings based on the lower end of the audit fees, $6,500. If the higher end of the fees, $13,000 is assumed, the annual cost savings for large plans (including audit fees and estimated Form 5500 preparation costs) would range from $14,538 per filer to $14,649 per filer.

[105] SEPs that conform to the alternative method of compliance in 29 CFR 2520.104–48 or 2520.104–49 do not have to file a Form 5500; SIMPLEs do not have to file. For more detailed reporting requirements for SEPs and SIMPLE IRAs, see *https://www.irs.gov/pub/irs-tege/forum15_sep_simple_avoiding_pitfalls.pdf; see also https://www.irs.gov/retirement-plans/retirement-plans-for-self-employed-people.*

[106] Sometimes solo 401(k) is called as ''individual 401(k),'' or ''one-participant 401(k)'' or ''uni-401(k).'' For more information about solo-401(k) plans, including reporting requirements, see *https://www.irs.gov/retirement-plans/one-participant-401k-plans.* Because solo 401(k) plans do not cover any common law employees, they are not required to file an annual report under title I of ERISA, but must file a return under the Code. Such plans may be able to file a Form 5500–SF electronically to satisfy the requirement to file a Form 5500–EZ with the IRS.

[107] 29 CFR 2550.412–1 and 29 CFR part 2580.

of persons who handle plan funds or other property, generally referred to as plan officials. A plan official must be bonded for at least 10 percent of the amount of funds he or she handles, subject to a minimum bond amount of $1,000 per plan with respect to which the plan official has handling functions. In most instances, the maximum bond amount that can be required under ERISA with respect to any one plan official is $500,000 per plan; however, the maximum required bond amount is $1,000,000 for plan officials of plans that hold employer securities.[108]

Under the proposed rule, MEPs generally might enjoy lower bonding costs than would an otherwise equivalent collection of smaller, separate plans, for two reasons. First, it might be less expensive to buy one bond covering a large number of individuals who handle plan funds than a large number of bonds covering the same individuals separately or in smaller more numerous groups. Second, the number of people handling plan funds and therefore subject to ERISA's bonding requirement in the context of a MEP may be smaller than in the context of an otherwise equivalent collection of smaller, separate plans.

e. Increased Retirement Savings

The various effects of this rule, if finalized, could lead in aggregate to increased retirement savings. As discussed above, many workers would likely go from not having any access to a retirement plan to having access through a MEP. This has the potential to result in an increase in retirement savings, on average, for this group of workers. While some workers may choose not to participate, surveys indicate that a large number could. For a defined contribution pension plan, about 73 percent of all workers with access take up the plan.[109] Among workers whose salary tends to be in the lowest 10 percent of the salary range, this figure is about 40 percent.[110] One reason that these take-up rates are relatively high is that many plans use automatic enrollment to enroll newly hired workers, as well as, sometimes, existing workers. Automatic enrollment is particularly prevalent among large plans; in 2016 about 75 percent of plans with 1,000–4,999 participants use automatic enrollment, while only about 34 percent of plans with 1–49 participants do.[111]

Some workers may be saving in an IRA, either in an employer-sponsored IRA, payroll deduction IRA, or on their own. If they begin participating in a MEP 401(k), they would have the opportunity to take advantage of higher contribution limits, and some individuals could begin receiving employer contributions when participating in a MEP when they did not previously.

In general, MEPs could offer participants a way to save for retirement with lower fees. In particular, the fees are likely to be lower than in most small plans and in retail IRAs. The savings in fees could result in higher investment returns and thus higher retirement savings.

f. Improved Portability

In an economy where workers may change jobs many times over their career, portability of retirement savings is an important feature that can help workers keep track of their savings, retain tax-qualified status, and gain access to the investment options and fees that they desire. Some plan sponsors are not willing to accept rollovers from other qualified plans, which impedes portability. This is true particularly with respect to small plan sponsors that do not want to confront the administrative burden associated with processing rollovers. On the other hand, most large plans accept rollovers from other qualified plans, and the Department believes that it is reasonable to assume that MEPs meeting the requirements of this proposal also would accept rollovers, because, generally, they would constitute large plans.[112] Moreover, MEPs could facilitate increased portability for employees that leave employment to work for another employer that adopted the same MEP.[113] This might occur when the employers that adopted the MEP are in the same industry or are located in the same geographic area.

g. Increased Labor Market Efficiency

The increased prevalence of MEPs would allow small employers the opportunity to offer retirement benefits that are comparable to what large employers provide. Since employees value retirement benefits, this development would tend to shift talented employees toward small businesses. Such a shift would make small businesses more competitive. The reallocation of talent across different sectors of the economy would increase efficiency.[114]

h. Increased Equality

Increased availability of MEPs also has the potential to increase equality among workers saving for retirement. As noted above, automatic enrollment is particularly common among larger plans, and one study found that from 2007 to 2010, increasing use of automatic enrollment by plan sponsors increased participation in such plans.[115] Indeed, defined contribution pension plan participation dramatically increases when plans have an automatic enrollment feature, which helps bring black and Hispanic participation to similar levels as whites and Asians.[116] For those not subject to automatic enrollment, black and Hispanic participation rates are 13 percentage points and 18 percentage points, respectively, behind white participation.[117] However, for those subject to automatic enrollment, black and Hispanic participation rates are only three percentage points and two percentage points behind white participation.[118] The effect of automatic enrollment on minority participation is even more pronounced for lower salary brackets.[119] It is likely that minority participation rate would similarly increase if MEPs include an automatic enrollment feature like most large retirement plans.

This proposed rule also has the potential to increase equality among men and women in terms of retirement savings. As of 2012, working women are participating in retirement plans at the

[108] *See* DOL Field Assistance Bulletin 2008–04, *https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2008-04.*

[109] These statistics apply to private industry. U.S. Bureau of Labor Statistics, National Compensation Survey, Employee Benefits in the U.S. (March 2018).

[110] *Id.*

[111] Plan Sponsor Council of America, ''60th Annual Survey of Profit Sharing and 401(k) Plans, Reflecting 2016 Plan Year Experience'' (2017), Table 107.

[112] A survey of plan sponsors indicates that in 2016, about 76 percent of 401(k) plans with 1–49 participants accepted rollovers from other plans. Among larger plans, the figure is much higher; for example, approximately 95 percent of plans with 1,000–4,999 participants accept rollovers. The full details are more complex because many 401(k) plans responding yes accept rollover from some sources, such as another 401(k) plan, but not others, such as a defined benefit pension or an IRA.

[113] Paul M. Secunda, ''Uber Retirement,'' Marquette Law School Legal Studies Paper No. 17–1, (Jan. 2017).

[114] John J. Kalamarides, Robert J. Doyle, and Bennett Kleinberg, ''Multiple Employer Plans: Expanding Retirement Savings Opportunities,'' Prudential (Feb. 2017).

[115] The Ariel/Aon Hewitt Study, ''401(k) Plans in Living Color: A Study of 401(k) Savings Disparities Across Racial and Ethnic Groups,'' (April 2012).

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

same rate as working men,[120] but women are still less prepared for retirement than men due to differences in labor force participation and household production. In addition to having more time out of the labor force on average, women are more likely to work part time, leading to lower savings in DC plans and lower accruals in DB plans. In 2014, among Vanguard's three million participants, the median amount accumulated in defined contribution pension plan accounts was $36,875 for men and $24,446 for women. For defined benefit pension plans in 2010, men received $17,856 in median income, whereas women received $12,000. For individuals that are 65 and older, women have a median household income that is 26 percent less income than that for men.[121] This proposed rule could help women in the workforce increase saving for retirement because of increased access and portability, especially to the degree that there would be benefits for part-time workers and self-employed workers.

The Code generally gives tax advantages to certain retirement savings over most other forms of savings.[122] Consequently, all else being equal, a worker who is saving money in tax-qualified retirement savings vehicle generally can enjoy higher lifetime consumption and wealth than one who does not. The magnitude of the relative advantage generally depends on the worker's tax bracket, the amount contributed to the plan, the timing of contributions and withdrawals, and the investment performance of the assets in the account. Workers that do not contribute to a qualified retirement savings vehicle due to lack of access to a workplace retirement plan do not reap this relative advantage. This proposed rule would likely increase the number of American workers with access to a tax-qualified workplace retirement plan, which would spread this financial advantage to some people who are not currently receiving it.

i. Improved Data Collection

This proposed rule also has the potential to improve the Department's data collection for purposes of its ERISA enforcement. As noted above, the expansion of MEPs is likely to lead to some employers who previously filed their own Form 5500s[123] to join a MEP that files a single Form 5500 on behalf of its participating employers. Since MEPs are usually large plans, they will likely have a much more detailed filing with associated schedules and an audit report. This filing will tend to be higher quality, more accurate data than the Department currently receives when a collection of participating employers are filing as single-employer plans. That is both because the required filing for plans with more than 100 participants requires more detail and because participating employers would start being part of an audit when they were not audited previously. This audit would add a layer of review that may help to prevent fraud and abuse. And on the whole, the proposal would both lead to more robust data collection for the Department to undertake its research, oversight, and enforcement responsibilities under ERISA.

The Department also believes that this proposal would improve the quality of information collected. The Department has encountered instances of separate Form 5500 filings that fail to account properly for each participating employer's plan financial and demographic information on a granular enough level for accurate reporting of each participating employer's proper proportion of the MEP as a whole. The Department also has at times received almost identical filings for each participating employer within a MEP. This duplication can lead to an overstatement or understatement of participant counts, amount of assets, amount of fees, and other important financial and demographic data for single employer plans and a failure to be able to assess the statistics of all MEPs. The Department continually strives to detect and correct filing errors and to improve filing instructions. Nonetheless, data quality could be improved insofar as MEPs meeting the requirements of the proposal would be likely to possess the expertise to file Form 5500 correctly. Moreover, it might require fewer resources for the Department to detect and correct filing errors among a relatively small number of reports filed by large MEPs than among a far larger number of reports filed by separate small plans.

6. Costs

The proposed rule would not impose any direct costs because it merely clarifies which persons may act as an ''employer'' within the meaning of section 3(5) of ERISA in sponsoring a MEP. The rule imposes no mandates but rather is permissive relative to baseline conditions. Concerns have been expressed, however, that MEPs could be vulnerable to abuse, such as fraud, mishandling of plan assets or charging excessive fees. Abuses might result from the fact that employers are not directly overseeing the plan. For example, employers acting as plan sponsors of single-employer plans can be effective fiduciaries as they have incentives to protect their plans. In the case of a MEP, however, an adopting employer will have limited fiduciary duties and may assume other participating employers are more thoroughly policing the plan. In fact, GAO found that some MEPs' marketing materials, and even MEP representatives, mislead employers about fiduciary responsibilities with claims that joining a MEP removes their fiduciary responsibility entirely.[124] Less monitoring provides an environment where abuses can occur. On the other hand, having multiple participating employers monitoring a MEP plan sponsor may actually lead to heightened protections for the collective.

MEPs have the potential to build up a substantial amount of assets quickly, particularly where employers that already offer plans join MEPs and transfer existing retirement assets to the MEP, thus making them a target for fraud and abuse. Because the assets are used to fund future retirement distributions, such fraudulent schemes could be hidden or difficult to detect for a long period. A 2012 GAO report regarding federal oversight of data and coordination of MEPs discusses potential abuses by MEPs, such as

[120] The authors' estimates are based on analysis of the Survey of Income and Program Participation using interviews that were conducted in 2012. Jennifer Erin Brown, Nari Rhee, Joelle Saad-Lessler, and Diane Oakley, ''Shortchanged in Retirement: Continuing Challenges to Women's Financial Future,'' National Institute on Retirement Security, (March 2016).

[121] Household income is the sum of income from all sources including wages, Social Security, defined benefit pensions, withdrawals from defined contribution accounts and IRAs, and other. *Id.*

[122] But for the special tax status of retirement contributions and investments, employer contributions to pension plans and income earned on pension assets generally would be taxable to employees as the contributions are made and as the income is earned, and employees would not receive any deduction or exclusion for their pension contributions. Currently under the Code, employer contributions to qualified pension plans and, generally, employee contributions made at the election of the employee through salary reduction are not taxed until distributed to the employee, and income earned on pension assets is not taxed until distributed. The tax expenditure for ''net exclusion of pension contributions and earnings'' is computed as the income taxes forgone on current tax-excluded pension contributions and earnings less the income taxes paid on current pension distributions.

[123] Although the individual participating employers are filing their own Forms 5500 (or Forms 5500–SF), the entity may be providing Form 5500 preparation and filing services for all the participating employers and be acting as a ''batch submitter'' and otherwise taking advantage of certain economies of scale.

[124] U.S. Government Accountability Office, GAO, 12–665, ''Private Sector Pensions—Federal Agencies Should Collect Data and Coordinate Oversight of Multiple Employer Plans,'' (Sept. 2012) (*https://www.gao.gov/products/GAO-12-665*).

charging excessive fees or mishandling plan assets.[125] If MEPs are at greater risk for fraud and abuse than single-employer plans, and some employers who are currently sponsoring single-employer retirement plans decide to join a MEP instead, that could put more participants and their assets at greater risk of fraud and abuse. But single-employer DC plans are also vulnerable to these abuses and to mismanagement, and some MEPs may be more secure than some otherwise separate small plans. The Department is not aware of any direct information indicating whether the risk for fraud and abuse is greater in the MEP context than in other plans. Many small employers have relationships based on trust with trade associations that may sponsor MEPs under the proposal, and those associations have an interest in maintaining these trust relationships by ensuring that fraud does not occur in MEPs they sponsor. Nevertheless, employers choosing to begin and continue participating in a MEP should ensure that the MEP is sponsored and operated by high quality, reputable providers.

The Department does not have a basis to believe that there will be increased risk of fraud and abuse due to the proposed rule's provisions with respect to PEOs. As stated earlier in the preamble, a PEO's assumption and performance of substantial employment functions on behalf of its client employers is a lynchpin of the proposal. Requiring the PEO to provide employment functions mitigates to some extent fraud concerns because the PEO will be a fiduciary and bear all of the responsibilities associated with that. The Department believes this proposal mitigates fraud concerns associated with the expansion of PEO-sponsored plans.

Moreover, the proposal provides a safe harbor for certain ''certified professional employer organization'' (CPEO) within the meaning of section 7705 of the Code and regulations thereunder. Generally, a CPEO is a PEO that demonstrates a specified level of structural and financial integrity under federal tax law. To become and remain a CPEO, the PEO must satisfy certain requirements as to its federal employment tax compliance and as to the status of its positive working capital, have certain background and experience in functioning as a PEO, be organized and have a physical business location within the United States, report its annual audited financials to the IRS, and meet bonding and other requirements described in the CPEO statute and regulations including independent auditing and related attestation requirements. Employers may consider these attributes when evaluating retirement options because they may reduce the potential for fraud, abuse, and mismanagement when PEOs perform employment functions on behalf of client employers.

7. Transfers

Several transfers are possible as a result of this proposed rule. To the extent the expansion of MEPs leads employers that previously sponsored other types of retirement plans to terminate or freeze these plans and adopt a MEP, there may be a transfer between the employer and the employees, although the direction of the transfer is unclear. Additionally, if employers terminate or freeze other plans to enroll in a MEP, and if that MEP utilizes different service providers and asset types than the terminated plan, those different service providers would experience gains or losses of income or market share. Service providers that specialize in providing services to MEPs might benefit at the expense of other providers who specialize in providing services to small plans.

The proposed rule could also result in asset transfers if MEPs invest in different types of assets. For example, small plans tend to rely more on mutual funds, while larger plans have greater access to other types of investment vehicles such as bank common collective trusts and insurance company pooled separate accounts, which allow for specialization and plan specific fees. This movement of assets could see profits move from mutual funds to other types of investment managers.

Finally, the Code provides substantial tax preferences for retirement savings. If access to retirement plans and savings increase as a result of this proposed rule, a transfer will occur flowing from all taxpayers to those individuals receiving tax preferences as a result of new and increased retirement savings.

8. Impact on the Federal Budget

The effects of the proposed rule on the federal budget are uncertain. Because the proposed rule would increase access to retirement plans, tax revenues would be reduced in the short run due to the tax deferral associated with an increase in retirement savings. But the amount of the reduction would depend upon how many more dollars would be invested in retirement plans receiving traditional tax treatment rather than after-tax Roth treatment. And it is unclear to what degree people would consume less to save more, or alternatively offset their new savings by going into debt or by reducing savings in non-retirement accounts or future retirement savings. Consequently, the long run net change in consumption and investment and effect on the federal budget is uncertain.

9. Uncertainty

As discussed above, the Department expects this proposed rule would expand workers' access to employment-based retirement plans by easing the burden of offering retirement benefits for employers—particularly small employers. However, the exact extent to which access to employment-based retirement plans would increase under this proposed rule is uncertain.

Several reports suggest that, although important, employers may not consider offering retirement plans a priority as compared to other types of benefits. The most commonly offered benefit is paid leave, followed by health insurance; retirement plans rank third.[126] This order holds true for small employers, as well.[127] Another survey of employers confirms that small employers offer health insurance more often than retirement plans.[128] That study also suggests that company earnings and the number of employees affect the decision whether or not to offer retirement plans: Employers that experience increases in earnings or the number of employees are more likely to offer retirement plans.[129] The top reason provided for employers to start offering a retirement plan is the increase in business profits.[130] Similarly, in another survey, employers not offering retirement plans cite ''the company is not big enough'' most frequently as the reason why they do not offer retirement plans.[131] Although this rule would make it easier and less costly for employers to offer a workplace retirement savings vehicle, these surveys suggest that small employers are not likely to adopt a MEP unless their business is in a strong financial position and generating sufficient revenue streams. Also, it can

[125] *Id.*

[126] Board of Governors of the Federal Reserve System, ''Report on the Economic Well-Being of U.S. Households in 2017'' (May 2018).

[127] The Pew Charitable Trusts, ''Employer Barriers to and Motivations for Offering Retirement Benefits,'' 2017.

[128] Transamerica Center for Retirement Studies, ''All About Retirement: An Employer Survey, 17th Annual Transamerica Retirement Survey'' (Aug. 2017).

[129] The Pew Charitable Trusts, ''Employer Barriers to and Motivations for Offering Retirement Benefits,'' 2017.

[130] *Id.*

[131] Transamerica Center for Retirement Studies, ''All About Retirement,'' 2017.

be quite challenging for a small employer or self-employed individual to determine which plan is most appropriate. Business owners must understand the characteristics and features of the available options in order to choose the most suitable plan. A discussion of some of these options and their features follows:

SEP: Simplified Employee Pensions can be established by sole proprietors, partnerships, and corporations to provide retirement plan coverage to employees. SEPs must be offered to all employees who are at least 21 years old, were employed by the employer in three out of the last five years, and received compensation for the year ($600 for 2018).

SEPs are completely employer funded and they cannot accept employee contributions.[132] Each year the employer can set the level of contributions it wants to make, if any. The employer usually makes a contribution to each eligible employee's SEP–IRA that is equal to the same percentage of salary for each employee. The annual per-participant contribution cannot exceed the lesser of 25 percent of compensation or $55,000 in 2018.

Participants can withdraw funds from their SEP–IRA at any time subject to federal income taxes, and possibly a 10 percent additional tax on early distributions, if the participant is under age 59½. Participants cannot take loans from their SEP–IRAs.

Generally, these plans are easy to set up; the business owner may use IRS Form 5305–SEP to establish the plan, and in some circumstance there are no set-up fees or annual maintenance charges. SEPs normally do not have to file a Form 5500.

SIMPLE IRA Plan: The Savings Incentive Match Plan for Employees of Small Employers allows businesses with fewer than 100 employees to establish an IRA for each employee. The employer must make the plan available to all employees who received compensation of at least $5,000 in any prior two years and are reasonably expected to earn at least $5,000 in the current year. In 2018, employees are allowed to make salary deferral contributions up to the lesser of 100 percent of compensation or $12,500. Employees 50 or older may also make additional (''catch-up'') contributions of up to $3,000. The employer also must make either a matching contribution dollar-for-dollar for employee contributions up to three percent of compensation, or a non-elective contribution set at two percent of compensation.

Participants can withdraw funds from their SIMPLE–IRA at any time subject to federal income taxes. A 25 percent additional tax may apply to withdrawals occurring within two years of commencing participation, if the participant is under age 59½. A 10 percent additional tax may apply after the two-year period, if the participant is under age 59½. Participants cannot take loans from their SIMPLE IRAs.

Similar to SEPs, SIMPLE IRA plans are easy to set up and have few administrative burdens. The employer may use IRS Form 5304–SIMPLE or 5305–SIMPLE to set up the plan, and there is no annual filing requirement for the employer. Banks or other financial institutions handle most of the paperwork. Similar to SEPs, some companies offer to set up SIMPLE IRAs with no set-up fees or annual maintenance charges.

Payroll Deduction IRAs: An easy way for small employers to provide their employees with an opportunity to save for retirement is by establishing payroll deduction IRAs. Many people not covered by a workplace retirement plan could save through an IRA, but do not do so on their own. A payroll deduction IRA at work can simplify the process and encourage employees to get started. The employer sets up the payroll deduction IRA program with a bank, insurance company or other financial institution. Then each employee chooses whether to participate and if so, the amount of payroll deduction for contribution to the IRA. Employees are always 100 percent vested in (have ownership in) all the funds in their IRAs. Participant loans are not permitted. Withdrawals are permitted anytime, but they are subject to income tax (except for certain distributions from nondeductible IRAs and Roth IRAs). An additional 10 percent additional tax may be imposed if the employee is under age 59½.

Employees' contributions are limited to $5,500 for 2018. Additional ''catch-up'' contributions of $1,000 per year are permitted for employees age 50 or over. Employees control where their money is invested and also bear the investment risk.

Payroll deduction IRAs are not covered by ERISA if:

- No contributions are made by the employer;
- Participation is completely voluntary for employees;
- The employer's sole involvement in the program is to permit the IRA provider to publicize the program to employees without endorsement, to collect contributions through payroll deductions, and to remit them to the IRA provider; and
- The employer receives no consideration in the form of cash or otherwise, other than reasonable compensation for services actually rendered in connection with payroll deductions.[133]

Solo 401(k): Self-employed individuals with no employees other than themselves and their spouses may establish a self-employed 401(k), colloquially referred to as a solo 401(k). As an employee, a self-employed individual may make salary deferrals up to the lesser of 100 percent of compensation or $18,500 in 2018.[134] They also can make nonelective contributions up to 25% of compensation provided that, when added to any salary deferrals, the total contribution does not exceed the lesser of 100 percent of a participant's compensation or $55,000[135] (for 2018). In addition, those aged 50 or older can make additional (''catch-up'') contributions of $6,000.

Withdrawals are permitted only upon the occurrence of a specified event (retirement, plan termination, etc.), and they are subject to federal income taxes and possibly a 10 percent additional tax if the participant is under age 59½. The plan may permit loans and hardship withdrawals.

Solo 401(k) plans are more administratively burdensome than other types of plans available to small employers. A model form is not available to establish the plan. A Form 5500 must be filed when plan assets exceed $250,000.

Credit for Pension Start-Up Costs: A tax credit is available for small employers to claim part of the ordinary and necessary costs to start a SEP, SIMPLE IRA, or 401(k) plan. To be eligible for the credit, an employer must have had no more than 100 employees who received at least $5,000 of compensation from the employer during the tax year preceding the first credit year. The credit is limited to 50 percent of the qualified cost to set up and administer the plan, up to a maximum of $500 per year for each of the first three years of the plan.

Saver's Credit: A nonrefundable tax credit for certain low- and moderate-income individuals (including self-employed) who contribute to their plans also is available (''Saver's Credit''). The

[132] This rule does not apply to a SEP in effect on December 31, 1996, if the SEP provided for pre-tax employee contributions (commonly referred to as a SARSEP) as of that date.

[133] 29 CFR 2510.3–2(d).

[134] IRC section 402(g).

[135] IRC section 415(c).

amount of the Saver's Credit is 50 percent, 20 percent, or 10 percent of the participant's contribution to an IRA or an employer-sponsored retirement plan such as a 401(k) depending on the individual's adjusted gross income (reported on Form 1040 series return). The maximum credit amount is $2,000 ($4,000 if married filing jointly).

Comparison of Options: The options discussed above may better serve an employer's needs than a MEP would in some circumstances. Some companies offer to set up solo 401(k) plans with no set-up fees.[136] Despite these currently available options for self-employed workers, about 94 percent of self-employed (not wage and salary workers) did not participate in retirement plans in 2013.[137] Although these low levels of take-up with these other options create some uncertainty that this proposed rule would persuade many self-employed individuals to join a MEP, this uncertainty alone is no basis to ignore MEPs as a possible solution to a stronger retirement for America's workers.

SEP and SIMPLE IRA plans, for example, could meet the needs of many small employers. As discussed above, they are easy to set up and have low start-up and administration costs. Furthermore, small employers can claim tax credits for part of the costs of starting up SEP or SIMPLE IRA plans and certain employees may take advantage of the Saver's Credit. Despite these advantageous features, these plans did not gain much traction in the market, and the effect of MEPs is uncertain. This line of reasoning suggests that increased access to MEPs may only have modest success in increasing retirement coverage.

In addition to these plan options, there are other ways that existing small employers can offer retirement plans at low costs. For micro plans with assets less than $5 million, employers can use providers of bundled financial services that include both payroll and recordkeeping services on their 401(k) products. In 2016, about 69 percent of plans with less than $1 million in assets used these bundled providers.[138] Given that multiple low-cost options already exist for small employers, it is unclear to what degree small employers and their workers would benefit from also having the option to join various MEPs.

Although this rule would ease the burden of employers, particularly small employers, in offering retirement plans for their workers, it is uncertain how many more employers would offer retirement plans to their workers because of this proposed rule and how many more employees would chose to participate in those retirement plans. To begin, workers employed by small employers not offering retirement plans tend to be younger workers, lower-paid workers, part-time workers, or immigrants,[139] characteristics that at least one survey suggests reduce the lack of demand for retirement benefits.[140] Indeed, one study found that large employers not sponsoring retirement plans tended to have similar characteristics among their employees: Higher proportions of part-time or part-year employees, younger employees, employees with lower earnings, and employees with less education. Another study found that the unobservable factors influencing the decision to be self-employed were also likely to decrease participation in retirement plans.[141] This implies the low sponsorship rate at small firms could be due more to differences in demand for retirement benefits by employees than to the higher per-employee administration costs.[142]

Another factor influencing employee participation in retirement savings plans is employers' matching contributions,[143] which this rule would not directly affect. While most small plan sponsors offer matching contributions, small plan sponsors are a little less likely to offer matching contributions than large plan sponsors.[144] It is difficult to anticipate how many small employers would join a MEP, whether they would offer matching contributions, and whether and how those contributions would differ from those offered previously.

Several additional factors may influence employer participation in expanded or newly established MEPs. For large employers, even though the potential cost savings associated with filing Form 5500s and audit reports discussed earlier can be substantial, the savings may not be large enough to persuade them to join a MEP. Switching from an existing well-established plan to a MEP could be a difficult and costly procedure in the short term. Furthermore, some employers may be hesitant to join a MEP due to the unified plan rule,[145] colloquially referred to as the ''one bad apple'' rule. Under the unified plan rule, the qualification of a MEP is determined with respect to all employers maintaining the MEP. Consequently, the failure by one employer maintaining the plan (or by the plan itself) to satisfy an applicable qualification requirement will result in the disqualification of the section 413(c) plan for all employers maintaining the plan. In addition to the directives to the Secretary of Labor, described earlier, the Executive Order directs the Secretary of the Treasury to consider proposing amendments to regulations or other guidance regarding the circumstances in which a MEP may satisfy the tax qualification requirements, including the consequences if one or more employers that sponsored or adopted the plan fails to take one or more actions necessary to meet those requirements.[146]

In sum, there are many challenges and inherent uncertainties associated with efforts to expand the coverage of retirement plans, but this proposed rule would provide another opportunity for small employers and the self-employed to adopt a retirement savings plan. By reducing some of the burdens associated with setting up and administering retirement plans, this proposed rule could lower costs and encourage employers, particularly small employers, to establish a retirement savings plan for their workers.

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[136] Kerry Hannon, ''The Best Retirement Plans for the Self-Employed.'' *Forbes,* (April 1, 2011).

[137] Copeland, ''Employment-Based Retirement Plan Participation, 2013.''

[138] Cerulli Associates, *U.S. Retirement Markets 2016.* (available at *https://www.cerulli.com/vapi/public/getcerullifile?filecid=Cerulli-US-Retirement-Markets-2016-Information-Packet*).

[139] Copeland, ''*Employment-Based Retirement Plan Participation,* 2013.'' Constantijn W.A. Panis & Michael J. Brien ''Target Populations of State-Level Automatic IRA Initiatives,'' (August 28, 2015) (*available at https://www.dol.gov/sites/default/files/ebsa/researchers/analysis/retirement/target-populations-of-state-level-automatic-ira-initiatives.pdf*).

[140] The Pew Charitable Trusts, ''Employer Barriers to and Motivations for Offering Retirement Benefits,'' 2017.

[141] Sharon A. Devaney and Yi-Wen Chien, ''Participation in Retirement Plans: A Comparison of the Self-employed and Wage and Salary Workers,'' *Compensation and Working Conditions,* (Winter 2000) (*available at https://www.bls.gov/opub/mlr/cwc/participation-in-retirement-plans-a-comparison-of-the-self-employed-and-wage-and-salary-workers.pdf*).

[142] Peter Brady and Michael Bogdan, ''Who Gets Retirement Plans and Why: An Update,'' *ICI Research Perspective,* vol. 17, No. 3 (March 2011).

[143] Cerulli Associates, *U.S. Evolution of the Retirement Investor 2017* (available at *https://www.cerulli.com/vapi/public/getcerullifile?filecid=Cerulli-2017-US-Evolution-of-the-Retirement-Investor-Information-Packet*).

[144] Transamerica's employer survey found that the share of small plan sponsors offering matching contributions was 77 percent compared with 84 percent for large plan sponsors. Transamerica Center for Retirement Studies, ''All about Retirement,'' 2017). Plan Sponsor Council of America, ''60th Annual Survey of Profit Sharing and 401(k) Plans Reflecting 2016 Plan Year Experience,'' 2017.

[145] Treas. Reg. § 1.413–2(a)(3)(iv).

[146] The Department of the Treasury and the IRS have informed the Department that they are actively considering matters relating to the Executive Order, including whether additional regulatory or other guidance would be beneficial.

10. Regulatory Alternatives

As required by E.O. 12866, the Department considered various alternative approaches in developing this proposed rule, which are discussed below.

Covering Other Types of MEPS: The Executive Order on Strengthening Retirement Security in America called on the Department to consider whether businesses or organizations other than groups or associations of employers and PEOs should be able to sponsor a MEP by acting indirectly in the interest of participating employers in relation to the plan within the meaning of section 3(5) of ERISA. The Department is aware of two other types or categories of MEPs not specifically addressed in the proposed rule.[147] The first category includes so-called ''corporate MEPs,'' which are plans that cover employees of related employers, such as affiliates and subsidiary companies, but that are not in the same controlled group, within the meaning of section 414(b) and (c) of the Code. The second category consists of ''open MEPs,'' which are pension plans that cover employees of employers with no relationship other than their joint participation in the MEP, which often are referred to as ''pooled employer plans.'' MEPs pool the assets of unrelated employers to pay the benefits and cover costs. The Department considered, but decided not to include such categories of MEPs in the proposal because they implicate different policy concerns. Nevertheless, consistent with the Executive Order, in Section E above in this preamble, the Department specifically solicits public comments on whether it should address one or more of these other categories of MEPs, by regulation or other means. It also solicits comments on whether the rule should apply to types of pension plans other than defined contribution pension plans.

PEO Safe Harbor: The proposal contains two regulatory safe harbors for PEOs to determine whether they will be considered to perform substantial employment functions on behalf of its client-employers. The first safe harbor provides that a PEO will satisfy the requirement if, among other things, it is a CPEO and meets at least two criteria in the list in paragraph (c)(2)(ii)(D) through (I) of the proposal. The second safe harbor is for PEOs that do not satisfy the CPEO safe harbor but meet five or more criteria from the list in paragraph (c)(2)(ii) of the proposal. In considering possible alternatives, the Department considered requiring PEOs to satisfy additional criteria listed in paragraph (c)(2)(ii) of the proposal. Additionally, the Department considered requiring PEOs to satisfy fewer criteria listed in paragraph (c)(2)(ii) of the proposal. Ultimately, for this proposal, the Department chose five as the number of criteria because the covered PEOs then must meet at least half of the relevant criteria. The Department is of the view that meeting at least half of the listed criteria demonstrates convincingly that the PEO is performing substantial employment functions and ensures that PEOs that satisfy the safe harbor provision do not represent borderline cases under the employer definition in section 3(5) of ERISA.

Working Owner Definition: The proposed definition of working owner would require that a person must work a certain number of hours (*i.e.,* 20 hours per week or 80 hours per month) or have wages or self-employment income above a certain level (*i.e.,* wages or income must equal or exceed the working owner's cost of coverage to participate in the group or association's health plan if the individual is participating in that plan). In considering possible alternatives, the Department considered relying only the hours worked threshold. However, the Department chose the formulation in this proposal (*i.e.,* allowing either the hours worked threshold or the income level threshold), because it best clarified when a working owner could join a group or association retirement plan and paralleled the working owner definition from the AHP Rule.

11. Paperwork Reduction Act

The proposed rule is not subject to the requirements of the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3501 *et seq.*) because it does not contain a collection of information as defined in 44 U.S.C. 3502(3).

12. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a proposal is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to present an initial regulatory flexibility analysis (IRFA) of the proposed rule. The Department has determined that this proposed rule, which would clarify the persons that may act as an ''employer'' within the meaning of section 3(5) of ERISA in sponsoring a MEP, is likely to have a significant impact on a substantial number of small entities. Therefore, the Department provides its IRFA of the proposed rule, below.

a. Need for and Objectives of the Rule

As discussed earlier in this preamble, the proposed rule is necessary to expand access to MEPs, which could enable groups of private-sector employers to participate in a collective retirement plan. MEPs meeting the requirements of the proposed rule could be an efficient way to reduce costs and complexity associated with establishing and maintaining defined contribution plans, which could encourage more plan formation and broader availability of more affordable workplace retirement savings plans, especially among small employers and certain working owners. Thus, the Department intends and expects that the proposed rule would deliver benefits primarily to the employees of many small businesses and their families including many working owners, as well as, many small businesses themselves.

b. Affected Small Entities

The Small Business Administration estimates that 99.9 percent of employer firms meet its definition of a small business.[148] The applicability of these proposed rules does not depend on the size of the firm as defined by the Small Business Administration. Small businesses, including sole proprietors, can join MEPs as long as they are eligible to do so and the MEP sponsor meets the requirements of the proposed rule. The Department believes that the smallest firms, those with less than 50 employees, are most likely to benefit from the savings and increased choice derived from the expanded MEPs coverage under the proposed rule. Section D.4, the ''Affected Entities'' section, above discusses which firms currently are covered by MEPs. These same types of firms, which are disproportionately small businesses, are

[147] A 2012 GAO report separated MEPs into four categories. U.S. Government Accountability Office, GAO, ''12–665, ''Private Sector Pensions—Federal Agencies Should Collect Data and Coordinate Oversight of Multiple Employer Plans,'' (Sept. 2012).

[148] The Small Business Administration, Office of Advocacy, 2018 Small Business Profile. *https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-US.pdf.* Lasted Accessed 10/03/2018. The SBA also reports that there are 5,881,267 business with between 1–499 employees. These firms are able to enroll in MEPs if they are eligible.

more likely to be covered in the future under this proposal. Approximately 8 million self-employed workers between ages 21 and 70, representing six percent of all similarly aged workers, have no employees and usually work at least 20 hours per week. These self-employed workers would become eligible to join MEPs under the proposal.[149]

c. Impact of the Rule

As stated above, by expanding MEPs, this proposed rule could provide a more affordable option for retirement savings coverage for many small businesses, thereby potentially yielding economic benefits for participating small businesses and their employees. Some advantages of an ERISA-covered retirement plan (including MEPs, SEP–IRAs, and SIMPLE IRAs) over IRA-based savings options outside the workplace include: (1) Higher contribution limits; (2) potentially lower investment management fees, especially in larger plans; (3) a well-established uniform regulatory structure with important consumer protections, including fiduciary obligations, recordkeeping and disclosure requirements, legal accountability provisions, and spousal protections; (4) automatic enrollment; and (5) stronger protections from creditors. At the same time, they provide employers with choice among plan features and the flexibility to tailor retirement plans that meet their business and employment needs.

There are no new record keeping or reporting requirements for compliance with the rule and, in fact, the recordkeeping and reporting requirements could decrease for some small employers under the proposal. If an employer joins a MEP meeting the requirements of the proposal, it can save some costs associated with filing Form 5500 and fulfilling audit requirements because a MEP is considered a single plan. Thus, one Form 5500 and audit report would satisfy the reporting requirements, and each participating employer would not need to file its own, separate Form 5500 and, for large plans or those few small plans that do not meet the small plan audit waiver, an audit report. These reports are normally prepared by a combination of legal professionals, human resource professionals and accountants.

The Department considered several alternatives such as whether to cover other types of MEPs and it developing its formulation of the PEO Safe Harbor and Working Owner definition. The ''Regulatory Alternatives'' section of the RIA above discusses these significant regulatory alternatives considered by the Department in more detail.

d. Duplicate, Overlapping, or Relevant Federal Rules

The proposed rule would not conflict with any relevant federal rules. As discussed above, the proposed rule would merely broaden the conditions under which the Department will view a group or association as acting as an ''employer'' under ERISA for purposes of offering a MEP, and make clear the conditions for PEO sponsorship. As such, the proposed criteria could also result in more MEPs being treated consistently under the Code and title I of ERISA, including MEPs administered by PEOs for the benefit of the employees of their client employers, as described in Rev. Proc. 2002–21.

13. Congressional Review Act

The proposed rule is subject to the Congressional Review Act (CRA) provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and, if finalized, will be transmitted to Congress and the Comptroller General for review. The proposed rule is a ''major rule'' as that term is defined in 5 U.S.C. 804(2), because it is likely to result in an annual effect on the economy of $100 million or more.

14. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each federal agency to prepare a written statement assessing the effects of any federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, this proposal does not include any federal mandate that the Department expects would result in such expenditures by State, local, or tribal governments, or the private sector. This is because the proposal merely clarifies which persons may act as an ''employer'' within the meaning of section 3(5) of ERISA in sponsoring a MEP and does not require any action or impose any requirement on the public sector or states.

15. Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism. E.O. 13132 requires federal agencies to follow specific criteria in forming and implementing policies that have ''substantial direct effects'' on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have federalism implications must consult with State and local officials and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the final rule.

In the Department's view, these proposed regulations would not have federalism implications because they would have not have a direct effect on the States, the relationship between the national government and the States, or on the distribution of power and responsibilities among various levels of government.

The Department welcomes input from affected States and other interested parties regarding this assessment.

16. Executive Order 13771 Reducing Regulation and Controlling Regulatory Costs

Executive Order 13771, titled Reducing Regulation and Controlling Regulatory Costs, was issued on January 30, 2017. This proposed rule is expected to be an E.O. 13771 deregulatory action, because it would provide critical guidance that would expand small businesses' access to high quality retirement plans at lower costs than would otherwise be available, by removing certain Department-imposed restrictions on the establishment and maintenance of MEPs under ERISA.

List of Subjects in 29 CFR Part 2510

Employee benefit plans, Pensions.

For the reasons stated in the preamble, the Department of Labor proposes to amend 29 CFR part 2510 as follows:

PART 2510—DEFINITIONS OF TERMS USED IN SUBCHAPTERS C, D, E, F, G, AND L OF THIS CHAPTER

■ 1. The authority citation for part 2510 is revised to read as follows:

Authority: 29 U.S.C. 1002(1), 1002(2), 1002(3), 1002(5), 1002(16), 1002(21), 1002(37), 1002(38), 1002(40), 1002(42), 1031, and 1135; Secretary of Labor's Order No. 1–2011, 77 FR 1088 (Jan. 9, 2012); Sec. 2510.3–101 and 2510.3–102 also issued under sec. 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. At 237 (2012), (E.O. 12108, 44 FR 1065 (Jan. 3, 1979) and 29 U.S.C. 1135 note. Sec. 2510.3–38 is also issued under sec. 1, Pub. L. 105–72, 111 Stat. 1457 (1997).

[149] DOL tabulations of the June 2018 Current Population Survey basic monthly data.

■ 2. Section 2510.3–3 is amended by revising paragraph (c) introductory text to read as follows:

§ 2510.3–3 Employee benefit plan.

* * * * *

(c) *Employees.* For purposes of this section and except as provided in § 2510.3–5(e) and § 2510.3–55(d):

* * * * *

■ 3. Revise the heading for § 2510.3–5 to read as follows:

§ 2510.3–5 Definition of Employer—Association Health Plans.

* * * * *

■ 4. Add § 2510.3–55 to read as follows:

§ 2510.3–55 Definition of Employer—Association Retirement Plans and Other Multiple Employer Pension Benefit Plans.

(a) *In general.* The purpose of this section is to clarify which persons may act as an ''employer'' within the meaning of section 3(5) of the Act in sponsoring a multiple employer defined contribution pension plan (hereinafter ''MEP''). The Act defines the term ''employee pension benefit plan'' in section 3(2), in relevant part, as any plan, fund, or program established or maintained by an employer, employee organization, or by both an employer and an employee organization, to the extent by its express terms or as a result of surrounding circumstances such plan, fund, or program provides retirement income to employees or results in a deferral of income by employees for periods extending to the termination of covered employment or beyond. For purposes of being able to establish and maintain an employee pension benefit plan within the meaning of section 3(2), an ''employer'' under section 3(5) of the Act includes any person acting directly as an employer, or any person acting indirectly in the interest of an employer in relation to an employee benefit plan. A group or association of employers is specifically identified in section 3(5) of the Act as a person able to act directly or indirectly in the interest of an employer, including for purposes of establishing or maintaining an employee benefit plan. A bona fide group or association of employers (as defined in paragraph (b) of this section) and a bona fide professional employer organization (as described in paragraph (c) of this section) shall be deemed to be able to act in the interest of an employer within the meaning of section 3(5) of the Act by satisfying the criteria set forth in paragraphs (b) and (c) of this section, respectively.

(b)(1) *Bona fide group or association of employers.* For purposes of title I of the Act and this chapter, a bona fide group or association of employers capable of establishing a MEP shall include a group or association of employers that meets the following requirements:

(i) The primary purpose of the group or association may be to offer and provide MEP coverage to its employer members and their employees; however, the group or association also must 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. For purposes of satisfying the standard of this paragraph (b)(1)(i), as a safe harbor, a substantial business purpose is considered to exist if the group or association would be a viable entity in the absence of sponsoring an employee benefit plan. For purposes of this paragraph (b)(1)(i), a business purpose includes promoting common business interests of its members or the common economic interests in a given trade or employer community and is not required to be a for-profit activity;

(ii) Each employer member of the group or association participating in the plan is a person acting directly as an employer of at least one employee who is a participant covered under the plan;

(iii) The group or association has a formal organizational structure with a governing body and has by-laws or other similar indications of formality;

(iv) The functions and activities of the group or association are controlled by its employer members, and the group's or association's employer members that participate in the plan control the plan. Control must be present both in form and in substance;

(v) The employer members have a commonality of interest as described in paragraph (b)(2) of this section;

(vi) The group or association does not make plan participation through the association available other than to employees and former employees of employer members, and their beneficiaries; and

(vii) The group or association is not 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.

(2) *Commonality of interest.* (i) Employer members of a group or association will be treated as having a commonality of interest if either:

(A) The employers are in the same trade, industry, line of business or profession; or

(B) Each employer has a principal place of business in the same region that does not exceed the boundaries of a single State or a metropolitan area (even if the metropolitan area includes more than one State).

(ii) In the case of a group or association that is sponsoring a MEP under this section and that is itself an employer member of the group or association, the group or association will be deemed for purposes of paragraph (b)(2)(i)(A) of this section to be in the same trade, industry, line of business, or profession, as applicable, as the other employer members of the group or association.

(c)(1) *Bona fide professional employer organization.* A professional employer organization (PEO) is a human-resource company that contractually assumes certain employer responsibilities of its client employers. For purposes of title I of the Act and this chapter, a bona fide PEO is capable of establishing a MEP. A bona fide PEO is an organization that meets the following requirements:

(i) The organization performs substantial employment functions, as described in paragraph (c)(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), the 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);

(iii) The organization ensures that each client 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; and

(iv) The organization ensures that participation in the MEP is available only to employees and former employees of the organization and client employers, and their beneficiaries.

(2) *Criteria for substantial employment functions.* The criteria in this paragraph (c)(2) are relevant to whether a PEO performs substantial employment functions 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 (c)(1)(i) of this section, as a safe harbor, an organization shall be considered to perform substantial employment

functions on behalf of its client employers if—

(i) The organization is a ''certified professional employer organization'' (CPEO) as defined in section 7705(a) of the Internal Revenue Code, and regulations thereunder, the CPEO has entered into a ''service contract'' within the meaning of section 7705(e)(2) of the Internal Revenue Code with respect to its client-employers that adopt the defined contribution MEP with respect to the client-employer employees participating in the MEP, pursuant to which it satisfies the criteria in paragraphs (c)(2)(ii)(A), (B), and (C) of this section, and the organization meets any two or more of the criteria set forth in paragraph (c)(2)(ii)(D) though (I) of this section; or

(ii) The organization meets any five or more of the following criteria with respect to client-employer employees participating in the plan:

(A) The organization is responsible for payment of wages to employees of its client-employers that adopt the plan without regard to the receipt or adequacy of payment from those client-employers;

(B) The organization is responsible for reporting, withholding, and paying any applicable federal employment taxes for its client employers that adopt the plan, without regard to the receipt or adequacy of payment from those client-employers;

(C) The organization is responsible for recruiting, hiring, and firing workers of its client-employers that adopt the plan in addition to the client-employer's responsibility for recruiting, hiring, and firing workers;

(D) The organization is responsible for establishing employment policies, establishing conditions of employment, and supervising employees of its client-employers that adopt the plan in addition to the client-employer's responsibility to perform these same functions;

(E) The organization is responsible for determining employee compensation, including method and amount, of employees of its client-employers that adopt the plan in addition to the client-employers' responsibility to determine employee compensation;

(F) The organization is responsible for providing workers' compensation coverage in satisfaction of applicable state law to employees of its client-employers that adopt the plan, without regard to the receipt or adequacy of payment from those client-employers;

(G) The organization is responsible for integral human-resource functions of its client-employers that adopt the plan, such as job-description development, background screening, drug testing, employee-handbook preparation, performance review, paid time-off tracking, employee grievances, or exit interviews, in addition to the client employer's responsibility to perform these same functions;

(H) The organization is responsible for regulatory compliance of its client-employers participating in the plan in the areas of workplace discrimination, family-and-medical leave, citizenship or immigration status, workplace safety and health, or Program Electronic Review Management labor certification, in addition to the client-employer's responsibility for regulatory compliance; or

(I) The organization continues to have employee-benefit-plan obligations to MEP participants after the client employer no longer contracts with the organization.

(d) *Dual treatment of working owners as employers and employee*s. (1) A working owner of a trade or business without common law employees may qualify as both an employer and as an employee of the trade or business for purposes of the requirements in paragraph (b) of this section, including the requirement in paragraph (b)(1)(ii) of this section that each employer member of the group or association adopting the MEP must be a person acting directly as an employer of one or more employees who are participants covered under the MEP, and the requirement in paragraph (b)(1)(vi) of this section that the group or association does not make participation through the group or association available other than to certain employees and former employees and their beneficiaries.

(2) The term ''working owner'' as used in this paragraph (d) means any person who a responsible plan fiduciary reasonably determines is an individual:

(i) Who has an ownership right of any nature in a trade or business, whether incorporated or unincorporated, including a partner or other self-employed individual;

(ii) Who is earning wages or self-employment income from the trade or business for providing personal services to the trade or business; and

(iii) Who either:

(A) Works on average at least 20 hours per week or at least 80 hours per month providing personal services to the working owner's trade or business, or

(B) In the case of a MEP described in paragraph (b) of this section, if applicable, has wages or self-employment income from such trade or business that at least equals the working owner's cost of coverage for participation by the working owner and any covered beneficiaries in any group health plan sponsored by the group or association in which the individual is participating or is eligible to participate.

(3) The determination under this paragraph (d) must be made when the working owner first becomes eligible for participation in the defined contribution MEP and continued eligibility must be periodically confirmed pursuant to reasonable monitoring procedures.

Signed at Washington, DC, October 16, 2018.

Preston Rutledge,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

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