SELECTING AN OPEN MEP[1]
EMPLOYERS DUE DILIGENCE CHECKLIST

PREPARED BY

CHARLES G. HUMPHREY, ESQ.*

	Does Employer Understand?	**Comment**	✓
1	Employer will not be relieved of <u>all</u> fiduciary liability under ERISA	Adoption of MEP itself by an employer is not a fiduciary function, but selection of MEP sponsor and responsibility for monitoring of the MEP provider is.	
2	Tax qualification of entire plan may be affected by problems of other employers	Disqualification of plan can lead to loss of deductions for contributions to the plan, income taxation of trust earnings and taxable income to participants; impact moderated by IRS Employee Plans Correction Resolution System (EPCRS).	
3	Service by employees with MEP employers is counted for eligibility and vesting	Not likely to be a significant factor in terms of decision to participate in the MEP	
4	Discrimination rules apply on individual employer-by-employer basis	This includes coverage and average deferral percentage and average contribution percentage testing	
5	Employer will be able to establish its own eligibility, vesting and contribution provisions	This puts employer in same position it would be in if it adopted its own plan, but without some of the other drawbacks associated with individual sponsorship.	
6	Plan assets are not segregated on an employer-by-employer basis	It is theoretically and practically possible that plan assets attributable to the contributions one employer could be used for the benefit of another employer's employees.	
	Impact on Current Structure		
7	Will you have to change your existing plan features?	Some MEPs may not have sufficient flexibility in their terms to accommodate your current plan design. Careful review of your plan against MEP is necessary before adopting the MEP.	
8	If you wish to retain your current adviser within an MEP arrangement, are they adviser-friendly, holding themselves accountable and transparent to the adopter's adviser?		
	Provider Experience and Support		
9	How long have the parties to the MEP been involved with MEPs?		
10	What are the credentials and MEP expertise of the various parties		

[1] An Open MEP is a single plan sponsored by an independent plan sponsor covering employees of a number of unrelated employers under a centralized administrative and fiduciary structure.

	involved with the MEP?		
11	Is there an ERISA attorney advising the MEP and maintaining the plan document? If so, what is their background specific to MEPs?		
	Plan Documentation		
12	Consists of basic plan document and joinder agreement	Using the joinder or participation agreement the adopting employer will elect the specific eligibility, vesting and contributions that will apply to its employees.	
13	Plan Administrator identified	Generally the plan sponsor/provider or the provider's advisory committee who will be responsible for most the plan's administrative functions such as coverage and discrimination testing, annual reporting, hiring of service providers, and notifications to participants.	
14	Named Fiduciary identified	Generally the plan sponsor/provider or the provider's advisory committee who will be responsible for the selection and monitoring of plan investments and investment advisers.	
	Basic MEP Structures		
15	Plans operated by third party administrators (TPAs)		
16	Plans operated by registered investment advisors (RIAs)		
17	Plans operated by independent plan sponsors		
	Self-Dealing and Prohibited Transactions	The providers operating MEPs described in lines 15-17 are fiduciaries and may not use that authority to benefit themselves or their affiliates, to determine their own compensation or pay themselves out of plan assets	
18	Is there a proper separation of the roles and ownership structure of the MEP's plan sponsor, independent fiduciary, and contracted service providers?		
19	How are all of the parties paid? Are there potential conflicts of interest or prohibited transactions?		
20	Does provider have any ability to determine its own compensation or to pay its affiliates additional compensation?	If the proposed arrangement has such a feature, the arrangement must be rejected.	
	Reasonableness of Compensation	Services provided to a plan by service providers are subject to ERISA Section 408(b) (2) which requires that no more than reasonable compensation be paid for them.	
21	What is the amount of compensation paid to the provider and other service under the arrangement? Is it	The employer should seek information from the provider about fees and compare that information to the fees charged by other providers offering similar services. This is often called	

	reasonable?	"benchmarking."	
	Plan Administration and Fiduciary Structure	Employers considering adopting a MEP must assess whether the provider can do the job.	
22	Who is handling the administration (TPA) work, fiduciary oversight, and plan operations?		
23	Does the provider have written policies and procedures?	If none are in place, the employer should look for another provider.	
24	If the answer is, yes, have those policies and procedures been audited or certified by an entity independent of the provider?	Evidence of certification shows that the provider is serious about its business and intends to apply the highest standards in plan operations.	
	Fiduciary Liability Insurance and Related Liability Items		
25	Does the Employer maintain fiduciary liability insurance?	The employer will want to know the amount and the carrier.	
26	Has the provider, within the last five years, been sued or settled claims by employers in connection with the provision of services under the MEP?		
27	Has the Plan, within the last five years, been audited by the IRS or Labor Department? If so, what were the findings/results?		
28	Is the provider willing to provide you references and contact information for employers who currently or formerly participated in the plan?		
29	Has the provider used the IRS EPCRS program or the Labor Department Delinquent Filer or Fiduciary Correction Program within the last five years to correct problems with the operation of the plan?		
	Employer Responsibilities		
30	Provision of Eligibility data such as dates of hire, birth dates, and hours of service to the provider.	The employer must timely provide accurate information to the MEP provider. This is a responsibility the adopting employer will not escape under any arrangement.	
31	Have appropriate arrangements been made for the transfer of payroll data? Do the compensation data codes align with the definitions of compensation in the Plan?	The transmittal of correct compensation information can have serious implications as it affects the amount of contributions and discrimination testing.	
32	Employers have responsibility to transfer salary deferral amounts take from pay as soon as those amounts can reasonably be segregated from plan assets.	The failure to satisfy this requirement can result in a prohibited transaction and the imposition of excise taxes on the employer.	

33	Clarification of responsibility for other tasks	Because ERISA and the Internal Revenue Code impose important disclosure requirements on employers and plan administrators, employers must know what, if any, responsibilities they have. These, to name a few, include the provision of SPDs, QDIA and other notices. Which of these responsibilities will be performed by the provider?	
	Plan Investments		
34	Responsibility for maintenance of plan investment policy statement (IPS)	Does the provider maintain an IPS? What does it say?	
35	Any responsibility in employer for selecting plan's investment line-up?	Depending on the arrangement, the employer could have some exposure to liability for plan investments.	
	Participant Education/Investment Advice		
36	Who is responsible for educating participants?	Is it the provider, a broker or someone else? How frequently will there be group meetings? What is the level of commitment?	
37	Will individualized investment advice be provided to participants, using model or level fee arrangement?	Does the arrangement comport with Labor Department rules, so that self-dealing prohibited transactions are avoided?	
	Reporting to the Employer by the Provider	Although adopting a MEP relieves employers of operational responsibilities, employers have oversight and monitoring responsibilities. Thus, they must have reports from the provider regarding plan operations.	
38	Annual Reports	Annually the provider should provide to the employer information relating to (i) plan investments (ii) fees; (iii) plan amendments made during the year; (iv) any significant problems with plan service providers or in the administration of the plan (v) any significant issues identified by the plan's auditor and (vi) participation and plan design improvement reports..	
39	Additional Reports	Any other report to the employer that the employer may need in its capacity as participating employer including any information needed to protect itself from liability in regard to the plan or correct a problem. Timely provided ADP and ACP discrimination testing results is an example. A copy of the MEP's Form 5500 annual information return should also be provided.	
	Getting Out	At some point an adopting employer will want to terminate the plan as to itself or establish its own plan and move MEP assets to that plan. What will happen at that time should be known prior to participating in the MEP.	
40	Does the MEP plan document reserve the participating employer the right to spin off assets?	Knowing the answer to this question will be important when the employer decides to completely stop offering 401(k) benefits.	
41	Can the provider throw you out of the MEP; for what reasons; under what terms?	This information is valuable for two reasons: (i) you will know in advance under what circumstances this could happen and (ii) it is important to know that employers with compliance problems threatening the overall plan can be removed from the plan.	
42	What fees will provider charge when the employer leaves the MEP?	This factor is an aspect of your "reasonableness of the fees" assessment.	
	Contractual		
43	Do the provider contracts have any	Current Labor Department guidance does not outright prohibit	

	limitation of liability or indemnification provisions?	such provisions, but it does require plan fiduciaries to determine their reasonableness in the context of the arrangement.	
44	Remedies/ compensation available to employer in event provider fails to maintain the qualification of the plan		
45	Who pays expenses of correcting operational errors?	When the operational error relates only to a particular employer, do other employers share in the cost of fixing the problem or is the cost shared among all employers? What if the error is the providers or is a service provider to the MEP hired by the provider?	
46	Representation that fiduciary liability insurance will be maintained		
47	Representation that the security and confidentiality of personal information will be maintained under State privacy laws.		
	Documents to Request from Provider Prior to Adoption of MEP		
48	Plan document and joinder agreement		
49	Plan policies and procedures		
50	Investment Policy Statement		
51	Annual Returns (last three years)		
	Getting Help		
52	If you do not have the in-house expertise to address the matters in this checklist, have you considered getting outside help?	An independent adviser or consultant, whose fees do not depend on whether or not your company joins the MEP, can help you assess the MEP arrangement and the reasonableness of fees and fulfill your fiduciary responsibilities.	
53	Have you retained ERISA counsel?	Review of plan documents and agreements by an attorney is a best practice.	

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*Charles G. Humphrey is the principal of Law Offices of Charles G. Humphrey, an ERISA and employee benefits law firm located in Andover, Massachusetts and Buffalo, New York. He is also a special consultant to Fiduciary Plan Governance Plan Governance, LLC, a fiduciary consulting firm dedicated to improving employee benefit plan processes and reducing fiduciary liability.

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"Multiple" Choice

Multiple Employer Plans—an enticing alternative for plan sponsors

Terrance Power
CFP, QPA, ERPA, AIFA, APR, CLU, ChFC
President
American Pension Services, Inc.

AN INTRIGUING new use of a long-established concept is catching the attention of small to mid-size plan sponsors seeking a way to simplify 401(k) plan oversight: Multiple Employer Plans (MEPs). By merging their plan into a properly structured MEP, employers cease to be a plan sponsor and effectively transfer many of the responsibilities and liabilities associated with being a named fiduciary to the MEP.

The MEP concept is exploding in popularity. Established under ERISA 413(c), MEPs historically have been used by companies that share a common industry or payroll provider, primarily association plans and professional employer organizations (employee leasing). However, as interest in outsourced fiduciary solutions has grown in recent years, a new generation of "open" MEPs for unrelated companies has sprung up. While MEPs can deliver tremendous benefit to many plan sponsors, an MEP is a solution in search of a problem for others. This article is written to help plan sponsors determine if this approach is a good fit for their organization.

An MEP (not to be confused with a multi-employer, or Taft Hartley, plan) is a retirement plan established by one plan sponsor that is then adopted by one or more participating employers. When an employer merges its current single-employer plan into a properly structured MEP, the role of plan sponsor then transfers from the adopting employer to the plan sponsor of the MEP.

The MEP sets up a single plan that covers all adopting employers, with the plan document generally written to allow for variation in plan design among the participating companies. Fund selection and monitoring generally are handled by the MEP. Discrimination testing and plan design (with some limitations) generally remain with the adopting employer.

The shift in responsibility results in several potential benefits:

Elimination of annual plan audit. Plans that cover more than 100 employees typically are required to have an annual plan audit performed as part of their annual plan Form 5500 filing. Under the MEP arrangement, there is still a plan audit, but only one that is performed at the overall MEP level. The annual audit that is required by each employer (now known as an "adopter") is eliminated, resulting in significant savings to the employer.

Mitigation of fiduciary risk. Indepen-

Selecting a Multiple Employer Plan

Questions to ask:

- Will you have to change your existing plan features?
- Who is handling the administration (TPA) work, fiduciary oversight, and plan operations?
- What are the credentials and MEP expertise of the various parties involved with the MEP?
- How long have the parties to the MEP been involved with MEPs?
- Is there an ERISA attorney advising the MEP and maintaining the plan document? If so, what is their background specific to MEPs?
- How are all of the parties paid? Are there potential conflicts of interest or prohibited transactions?
- If you wish to retain your current adviser within an MEP arrangement, are they adviser-friendly, holding themselves accountable and transparent to the adopter's adviser?
- Is there a proper separation of the roles and ownership structure of the MEP's plan sponsor, independent fiduciary, and contracted service providers?
- What measures does the MEP take to screen out "bad apples" that could affect the entire MEP? Does the MEP contract allow them to unilaterally push out adopters with compliance problems?

dent fiduciary W. Michael Montgomery described the impact on fiduciary liabilities in *Multiple Employer Plans as a Fiduciary Risk Mitigation Tool*:

"Employers adopting a sound Multiple Employer Plan…achieve a profound reduction in fiduciary risk exposure. The reason is a simple one: *The adopting employer ceases to perform certain key roles that incur fiduciary status*. When an employer merges its current single-employer plan into a properly structured MEP, it is no longer the sponsor of the plan. It also should cease to be a trustee, plan administrator, or any sort of named fiduciary. Those central roles move to the MEP, and the inherent fiduciary liability transfers with them."

The relief offered by MEP participation is extensive but not total. Certain responsibilities generally remain with the adopting employer, and even this reduced role must be taken seriously.

Those responsibilities include:

- The need to make timely and accurate plan contributions.
- Plan design decisions, such as the level of match.
- The decision to adopt or de-adopt the MEP, including necessary due diligence and monitoring of the MEP.
- Distribution to participants of required notices and information, though this may at times be handled directly by the MEP plan sponsor.
- Communication and enrollment assistance for participants.

Streamlining of plan operations. In addition to the audit elimination, MEP adopting employers no longer file a Form 5500, maintain a fidelity bond, or shoulder the responsibility for 408(b)(2) compliance. These are handled by the plan sponsor that is associated with the MEP, not the adopting employer. For some employers, this benefit is inconsequential. For others, the desire to let outside experts run the plan can be more important than either the audit relief or fiduciary risk mitigation.

MEPs are not a good fit for every employer. Some plan sponsors already are mitigating their fiduciary exposure through a comprehensive, well-documented fiduciary process. Others don't consider the cost or effort of an annual audit to be significant enough to justify making a change. Still others take satisfaction in staying engaged in plan oversight and fund monitoring. Simply put, if the advantages of an MEP appear to be solving a problem you don't have, this approach is not for you.

An employer also should consider the potential limitations inherent in most MEPs. These may include the following:

- The adopting employer does not select its own fund menu. For many, this is a relief. Others want to have more involvement in investment decisions and consider this a takeaway.
- Loss of current providers. Though some MEPs offer a degree of flexibility, most are tied to a single recordkeeper or third-party administrator, so you will most likely have to leave behind your current providers to enjoy the benefits of adopting an MEP.
- "Bad Apple" impact. Under ERISA, one adopting employer with serious compliance violations could cause the entire MEP to be disqualified, though a more likely scenario is that corrective measures will be taken. In the 20-plus years that I've been associated with Multiple Employer Plan clients, I've yet to see this occur. It is important that employers confirm the availability of a "disgorgement provision" in any MEP that they may be considering. This important plan design feature allows the MEP to quickly eject and thereby isolate any noncompliant adopter from the plan.

If these features are appealing and the limitations are acceptable, you may want to look further into the Multiple Employer Plan approach as a solution to your company's retirement plan strategy.

I've been told by plan sponsors that they decided to join an MEP because these programs are handled the same way as their other employee benefit programs, where the benefit providers handle all the details. For example, while an employer could, at least in theory, negotiate with doctors, hospitals, MRI service providers, pharmacies, etc., for their employees' medical coverage, most find it easier to outsource these micro-managed decisions to a third party—in that case, a health insurance provider that offers a group health-care policy.

There is a trade-off in control, options, etc., but there also is comfort in knowing that there are professionals at the helm and that they have a vested interest in making sure that their employees are taken care of in accordance with the terms of the arrangement.

Plan sponsors and their advisers will, of course, need to determine on a case-by-case basis whether these programs are a "fit" for their plans and their plan participants.

American Pension Services, Inc., is an independent third-party retirement plan administration firm located in Clearwater, Florida. APS handles the compliance and testing associated with qualified retirement plans (primarily 401(k) plans) for small to medium-size employers, as well as for numerous Professional Employer Organizations (PEOs) located across the country.

SELECTING AN OPEN MEP[1]
EMPLOYERS DUE DILIGENCE NUTSHELL CHECKLIST

PREPARED BY

CHARLES G. HUMPHREY, ESQ.*

	Does Employer Understand?	**Comment**	✓
1	Employer will not be relieved of <u>all</u> fiduciary liability under ERISA	Adoption of MEP itself by an employer is not a fiduciary function, but selection of MEP sponsor and responsibility for monitoring of the MEP provider is.	
2	Tax qualification of entire plan may be affected by problems of other employers	Disqualification of plan can lead to loss of deductions for contributions to the plan, income taxation of trust earnings and taxable income to participants; impact moderated by IRS Employee Plans Correction Resolution System (EPCRS).	
3	Service by employees with MEP employers is counted for eligibility and vesting	Not likely to be a significant factor in terms of decision to participate in the MEP	
4	Discrimination rules apply on individual employer-by-employer basis	This includes coverage and average deferral percentage and average contribution percentage testing	
5	Employer will be able to establish its own eligibility, vesting and contribution provisions	This puts employer in same position it would be in if it adopted its own plan, but without some of the other drawbacks associated with individual sponsorship.	
6	Plan assets are not segregated on an employer-by-employer basis	It is theoretically and practically possible that plan assets attributable to the contributions one employer could be used for the benefit of another employer's employees.	
	Impact on Current Structure		
7	Will you have to change your existing plan features?	Some MEPs may not have sufficient flexibility in their terms to accommodate your current plan design. Careful review of your plan against MEP is necessary before adopting the MEP.	
8	If you wish to retain your current adviser within an MEP arrangement, are they adviser-friendly, holding themselves accountable and transparent to the adopter's adviser?		
	Provider Experience and Support		
9	How long have the parties to the MEP been involved with MEPs?		

[1] An Open MEP is a single plan sponsored by an independent plan sponsor covering employees of a number of unrelated employers under a centralized administrative and fiduciary structure.

10	What are the credentials and MEP expertise of the various parties involved with the MEP?		
11	Is there an ERISA attorney advising the MEP and maintaining the plan document? If so, what is their background specific to MEPs?		
	Self-Dealing and Prohibited Transactions		
12	Is there a proper separation of the roles and ownership structure of the MEP's plan sponsor, independent fiduciary, and contracted service providers?		
13	How are all of the parties paid? Are there potential conflicts of interest or prohibited transactions? Does provider have any ability to determine its own compensation or to pay its affiliates additional compensation?		
	Reasonableness of Compensation	Services provided to a plan by service providers are subject to ERISA Section 408(b)(2) which requires that no more than reasonable compensation be paid for them.	
14	What is the amount of compensation paid to the provider and other service under the arrangement? Is it reasonable?	The employer should seek information from the provider about fees and compare that information to the fees charged by other providers offering similar services. This is often called "benchmarking."	
	Plan Administration and Fiduciary Structure	Employers considering adopting a MEP must assess whether the provider can do the job.	
15	Who is handling the administration (TPA) work, fiduciary oversight, and plan operations?		
16	Does the provider have written policies and procedures?	If none are in place, the employer should look for another provider.	
	Fiduciary Liability Insurance and Related Liability Items		
17	Does the Employer maintain fiduciary liability insurance?	The employer will want to know the amount and the carrier.	
18	Has the provider, within the last five years, been sued or settled claims by employers in connection with the provision of services under the MEP, been subject to a government audit or filed under an IRS or DOL correction program?		
	Employer Responsibilities		

19	Provision of Eligibility data such as dates of hire, birth dates, and hours of service to the provider.	The employer must timely provide accurate information to the MEP provider. This is a responsibility the adopting employer will not escape under any arrangement.	
20	Employers have responsibility to transfer salary deferral amounts take from pay as soon as those amounts can reasonably be segregated from plan assets.	The failure to satisfy this requirement can result in a prohibited transaction and the imposition of excise taxes on the employer.	
	Plan Investments		
21	Responsibility for maintenance of plan investment policy statement (IPS)	Does the provider maintain an IPS? What does it say?	
22	Any responsibility in employer for selecting plan's investment line-up?	Depending on the arrangement, the employer could have some exposure to liability for plan investments.	
	Participant Enrollment, Education/Investment Advice		
23	Who is responsible for enrolling and educating participants? Is investment advice provided?	Is it the provider, a broker or someone else? How frequently will there be group meetings? What is the level of commitment?	
	Reporting to the Employer by the Provider	Although adopting a MEP relieves employers of operational responsibilities, employers have oversight and monitoring responsibilities. Thus, they must have reports from the provider regarding plan operations.	
24	Annual Reports and Other Reports	Annually the provider should provide to the employer information relating to (i) plan investments (ii) fees; (iii) plan amendments made during the year; (iv) any significant problems with plan service providers or in the administration of the plan (v) any significant issues identified by the plan's auditor and (vi) participation and plan design improvement reports. What about periodic reports as required?	
	Getting Out	At some point an adopting employer will want to terminate the plan as to itself or establish its own plan and move MEP assets to that plan. What will happen at that time should be known prior to participating in the MEP.	
25	Does the MEP plan document reserve the participating employer the right to spin off assets?	Knowing the answer to this question will be important when the employer decides to completely stop offering 401(k) benefits.	
26	What fees will provider charge when the employer leaves the MEP?	This factor is an aspect of your "reasonableness of the fees" assessment.	
	Contractual		
27	Do the provider contracts have any limitation of liability or indemnification provisions?	Current Labor Department guidance does not outright prohibit such provisions, but it does require plan fiduciaries to determine their reasonableness in the context of the arrangement.	
28	Remedies/ compensation available to employer in event provider fails to maintain the qualification of the plan		
29	Who pays expenses of correcting operational errors?	When the operational error relates only to a particular employer, do other employers share in the cost of fixing the problem or is the cost shared among all employers? What if the error is the	

		providers or is a service provider to the MEP hired by the provider?	
	Representation that fiduciary liability insurance will be maintained		
	Getting Help		
30	If you do not have the in-house expertise to address the matters in this checklist, have you considered getting outside help?	An independent adviser or consultant, whose fees do not depend on whether or not your company joins the MEP, can help you assess the MEP arrangement and the reasonableness of fees and fulfill your fiduciary responsibilities.	
31	Have you retained ERISA counsel?	Review of plan documents and agreements by an attorney is a best practice.	

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*Charles G. Humphrey is the principal of Law Offices of Charles G. Humphrey, an ERISA and employee benefits law firm located in Andover, Massachusetts and Buffalo, New York. He is also a special consultant to Fiduciary Plan Governance Plan Governance, LLC, a fiduciary consulting firm dedicated to improving employee benefit plan processes and reducing fiduciary liability.

MEP RELATED EXCERPTS FROM THE TESTIMONY OF PHYLLIS C. BORZI ASSISTANT SECRETARY OF LABOR EMPLOYEE BENEFITS SECURITY ADMINISTRATION BEFORE THE SPECIAL COMMITTEE ON AGING UNITED STATES SENATE

March 7, 2012

Introductory Remarks

Good afternoon Chairman Kohl, Ranking Member Corker, and Members of the Committee. Thank you for inviting me to discuss small business retirement plan issues. I am Phyllis C. Borzi, the Assistant Secretary of Labor for the Employee Benefits Security Administration (EBSA). I am proud to represent the Department of Labor (Department), EBSA, and its employees, who work to safeguard retirement and other employee benefits for America's workers, retirees and their families and to support the growth of our private benefits system. Secretary Solis' overarching vision for the Department is to advance good jobs for everyone, and a good job, among other things, is one that provides a secure retirement. We are committed to promoting opportunities and helping America's workers to achieve a secure retirement.

Helping workers to achieve a dignified and secure retirement means encouraging employers to establish and maintain retirement plans and protecting workers' benefits. We know we must work particularly hard to assist small businesses because of the challenges small businesses face in providing retirement plans. There are six million businesses with fewer than 100 employees employing 42 million workers.1 Less than half of these businesses offer a retirement plan.2

1 U.S. Small Business Administration, Office of Advocacy, based on data for 2008 provided by the U.S. Census Bureau, Statistics of U.S. Businesses.

2 U.S. Bureau of Labor Statistics, National Compensation Survey: Employee Benefits in the United States, March 2011, Bulletin 2771. Private Industry Tables. Table 1, Establishments offering retirement and health care benefits. 2

To expand access for workers to employer-based retirement plans, the Department has long recognized that we need to reach out to the small business community. Employer-sponsored plans are the best way for most workers to accumulate savings for a financially secure retirement. It is not easy for workers to save and invest so that they will be able to maintain their current standard of living in retirement. According to experts, workers will need to replace 70 to 90 percent of preretirement income.3 Therefore, we need to do all we can to assist small employers in establishing and operating retirement plans.

Background

EBSA is responsible for the administration, regulation, and enforcement of the fiduciary, reporting, and disclosure provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). EBSA assists small employers in evaluating their options for establishing a retirement plan and provides compliance assistance to help employers understand their fiduciary and reporting responsibilities for employer-sponsored plans. We accomplish this through comprehensive education, outreach,4 and regulatory programs. ……..

Multiple Employer Plans

While it is clear from my testimony that the Department supports efforts to expand small business coverage, it is just as important that ERISA's protections for workers' pensions be 13

maintained. In that regard, the Department has more recently become aware of promoters marketing multiple employer plans, or "MEPs," that do not involve collective bargaining with an employee representative. These arrangements, often called "open MEPs," purport to allow totally unrelated businesses to join together to offer a collective pension plan. Promoters claim that these arrangements relieve businesses of their ERISA reporting and fiduciary obligations in connection with administering the plan or monitoring the plan investments and service providers. Proponents say such arrangements can provide the participating employers with a way to pool resources and reduce administrative costs. There are several bills pending in Congress which call for the Department, in coordination with the Treasury Department, to provide fiduciary relief and simplified administrative, reporting and disclosure obligations for multiple employer plans. We are currently analyzing these proposals.

Under ERISA, employee benefit plans must be sponsored by an employer, by an employee organization, or by both. ERISA expressly recognizes the idea of a "multiple employer plan" by including in the definition of "employer" 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."

For example, a MEP operated by a *bona fide* employer association or group of related employers is a well-established concept in ERISA. Such plans in fact can provide the participating employers with a way to pool resources and reduce administrative costs. The idea of "open MEPs," however, is not an established concept in ERISA. Indeed, EBSA has had difficult experiences with similar "open" employee benefit structures in the group health area. These arrangements, called "MEWAs," or multiple employer welfare arrangements, can be provided 14

through legitimate organizations, but they sometimes are marketed using attractive, but unsound, organizational structures and generate large, often hidden, administrative fees for the promoters. In addition, certain promoters try to use ERISA's general preemption of state laws as a way to avoid state insurance or other regulation. That fact, together with the claimed separation of the employer from accountability for the plan's administration, too often put workers at risk of not getting the benefits they were promised. Bringing this type of product to the pension marketplace presents a number of complicated and significant legal and policy issues. We understand that the Government Accountability Office is actively studying this development in the pension marketplace.

We have also heard about this "open MEP" development from regulated financial institutions, including insurance companies and other financial service providers, who currently are allowed under Internal Revenue Code rules to offer "prototype" plan products to employers. These prototype plans are another way to reduce legal and administrative costs of offering employees a tax qualified pension plan. Some financial institutions have expressed reservations about developing competing "open MEP" products. Their lawyers, based on a review of the many Department of Labor opinions and other guidance on "open MEWAs," have expressed concerns about whether these "open" benefit arrangements can fairly be classified as a "single" plan as opposed to a collection of separate plans being collectively administered much like the prototype plans they already offer. We have been informally asked to provide guidance in this area by some of those groups, and we have two formal requests for guidance, one directly presenting the open MEP issue and the other indirectly. We are actively working on answering these requests.
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Conclusion

Thank you for the opportunity to testify at this important hearing. We recognize the challenges small businesses face in providing retirement plans. As I noted, our partnerships from within the federal government and among external stakeholders are a key component to these efforts to develop and disseminate the information. We will continue to expand our efforts, paying particular attention to feedback we receive from small businesses and their service providers, to provide responsive, timely and comprehensive information and compliance assistance. The Department recognizes the critical role that small businesses play in the economy as employers. The Department remains committed to initiatives which protect both the security and growth of retirement benefits for workers, retirees, and their families.