



# Making Sense of MEPS and Other Fiduciary Delegation Models

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## AGENDA

- Why A MEP?
- Current Status of MEPs.
- What is a MEP? The MEP Technical Rules.
- Alternatives to MEPs to achieve similar goals, including 3(16) services.

## Why A MEP?

## *Managing risks*

Growing complexity, costs and liabilities related to the maintenance of DC plans: 5500 rules; 408b2; Participant disclosure rules; and growing fiduciary exposures create a marketplace for the professional 3(16) Plan Administrator.



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## *Access to better pricing of investment products.*

A MEP can provide the access to investment products (both variety and share class) that are otherwise unavailable to plans without scale; and avoid proprietary requirements.



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## *Sharing of administrative costs*

- “Small” adopting employers can obtain more favorable pricing on administrative costs.
- “Large” adopting employers share the cost of a single audit.
- The individual adopting employer has fewer obligations with regard to plan administration, so will spend less time in this “side activity” and more time on its business.



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## *Reduced Fiduciary Responsibility*

- MEP sponsor or investment advisor chooses the investment options for participant-directed accounts.
- This reduces the fiduciary responsibility of the adopting employer for the specific investment options available to the participants.





## *Regulatory Support*

Cost-effective professional regulatory support in finding and fixing regular plan errors.



## *Inertia*

Certain Associations have regularly provided this benefit to members. It is often an expectation of an Association.



## *You Just Have To*

- Franchises and joint ventures.
- Corporate transactions often result in “inadvertent” MEPs because level of ownership falls below controlled group levels, forcing a former single employer plan to become a MEP.

## Current Status of MEPs

## *That's What The DOL Said...*

- Advisory Opinion 2012-04
- No two, unrelated employers may co-sponsor a single ERISA retirement plan unless those employers are...
  - Members of a group with an "association" type of relationship, and
  - Members of that association control the plan, directly or indirectly.
- Determination of commonalty and control is based on existing guidance, including MEWA rulings.



## *Association MEPs*

- No single MEP when members include non-employers (especially if non-employers can control the plan).
  - Participating entities must be employers or employee organizations.
  - Issue when owner-only company joins an otherwise appropriate association plan.



## *The Two Cs*

- Commonality
  - Participating employers must have a “common employment bond.”
    - E.g., a group of YWCA chapters, which share close operating relationships separate from the participation in the MEP.
    - Chambers of Commerce likely too broad.
- Control
  - Exercised either directly or indirectly by participating employers.
  - May be problematic for PEOs.



## *The PEO Issue*

- The Advisory Opinion applies to all MEPS, not just to Open MEPS.
- Each MEP will need to review:
  - Relationship between employers.
  - Direct or indirect control given to employers.
  - ASO issues: how do you address a la carte services.





## The “Bifurcated” MEP

- Commonality and Control are only issues with the DOL, not the IRS.
- Can it be a single plan for the Code and Multiple Plans for ERISA?
- Leads to some interesting disconnects in plan operation.
- 414(l) and prohibited transaction problem:
  - 413(c) requires all assets of a plan be used for all benefits under the plan.
  - Comingling assets can only be accomplished in collective vehicles approved for these purposes.



## DOL ERISA Advisory Council

### MEP Recommendations

- Facilitate the use of multiple employer plans and similar arrangements as a means of encouraging plan formation.
- Consider developing a sample structure for multiple employer plans that will help ensure that conflicts of interest, prohibited transactions, fiduciary independence and disclosure are addressed.
- Develop rules or safe harbors for multiple employer plan sponsors and adopting employers that would minimize their liability from acts of non-compliant adopting employers.



## Other Efforts

- Continuing bi-partisan legislative efforts to overturn DOL's advisory opinion, and make MEPs more "user-friendly."
- DOL's focus is on non-MEP alternatives, such as the aggregation of services and the clarification of fiduciary delegation rules.



## What is a MEP? The MEP Technical Rules



## *General MEP Rules*

- A MEP under 413(c) is a non-collectively bargained plan which is maintained by more than one employer.
- Employers of a controlled group or under common control are considered as being part of the same employer. Thus, a plan covering just the employees within a controlled group is not considered a MEP.



## *General MEP Rules*

- Existing plans must terminate and merge old plan with MEP, filing a final Form 5500.
- A new plan is merely adopting the MEP.



## *General MEP Rules*

- Can either be a defined benefit plan or a defined contribution plan.
- Is legally considered a single plan, so the rules requiring “collective trusts” are not involved.



## *General MEP Rules*

A lead employer adopts a plan, which others join as adopting employer using a participation agreement.



## *General MEP Rules*

- A participation agreement should contain appropriate authority allocation language, regardless if it is to delegate fiduciary responsibilities or not.
- Plan documents need to reflect the proper administration and allocation of authority.



## *IRS MEP Rules*

- Note, if the participating sponsors are all members of the same controlled or affiliated service group, it's a single employer plan, not a MEP.
- Per IRS regulations, a plan is a single plan only if all of the plan assets are available to pay benefits to all employees covered by the plan.
- Must have a "Lead Sponsor."



## *IRS MEP Rules*

### Applied Across the Plan

- Eligibility, participation, benefit accrual.
- Vesting.
- IRC §415 limitations.
- DC funding requirements, if plan administrator elects.
- Plan qualification generally.



## *IRS MEP Rules*

### Applied to Each Employer Separately

- Nondiscrimination rules.
- Coverage rules.
- IRC §404 deductions.
- DB funding requirements.
- Compensation limitation.
- Top-heavy rules.
- EPCRS filings.



## *IRS MEP Rules*

- All employers maintaining a MEP filed under this option can rely on a favorable determination letter issued for the plan except with respect to the requirements of sections 401(a)(4), 401(a)(26), 401(l), 410(b), 414(s), and, if the employer maintains or has ever maintained another plan, sections 415 and 416.



## *IRS MEP Rules*

- A disqualifying failure caused by one employer taints the entire plan.
- A procedure whereby a disqualifying portion of the plan is immediately spun off into its own single employer plan may take care of the problem prospectively, but does not eliminate the defect that already occurred.
- Plan must go through EPCRS-compliant correction to avoid risk of disqualification.



## *ERISA MEP Rules*

- Under ERISA, to be a “plan,” it must be sponsored by an “employer.”
- Sec. 3(5) defines employer as “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.”



## *ERISA MEP Rules*

- ERISA § 210, Labor Reg § 2530.210
  - Single plan under the Code.
  - More than one employer.
  - Non-collectively bargained.
  - Qualify under § 413(c) as a MEP.
  - Outlines service counting rules.





## *ERISA MEP Rules*

- ERISA references to “multiple employer plans:
  - § 202(b)(1), minimum participation;
  - § 203(b)(1), minimum vesting;
  - § 204(b)(4)(A), (by incorporation by reference of § 202(b)), benefit accrual;
  - § 209(a)(2), recordkeeping requirements; and
  - § 210, titled “Multiple Employer Plans and Other Rules.



## *Putting It Together*

- “Responsibilities document” critical:
  - Outlines continuing obligation of each participating employer, as co-sponsor.
  - Delineates duties between Lead Sponsor and MEP underwriter.
  - Limits the Plan Administrators role.
  - Makes critical compensation disclosures.



## *Putting It Together*

- Contractual provision requiring errant adopting employer to pay the costs of any error it causes:
  - Can reduce the cost of correction to the plan; but is only as good as the ability and willingness of the promising employer to pay
    - I.e., a lawsuit may be required to extract payment.
    - A judgment-proof adopting employer cannot be made to pay anything.



## *Putting It Together*

- Make sure appropriate plan document and “responsibilities documents are in place to unwind “bad actors.”
- Compensation issues need to be paid special attention.



## Alternatives to MEPs



2012 U.S. Government Accountability Office  
Report:

*“MEPs are marketed as providing several advantages for employers over single-employer plans, but GAO found that these advantages may not always be unique to MEPs.”*



## Alternatives

What makes MEPs attractive is the ability to aggregate investments, document compliance and fiduciary services in a single place.

This need did not go away with the Advisory Opinion.

How do you aggregate under current law?



## Advantages to Alternatives

- Mimic MEP advantages through use of traditional contracting and delegation practices to aggregate services.
- Provides economies of scale in administration and investments, while providing professional fiduciary services.
- Allows TPA to disengage bad actor without “disgorgement.”
- Reduces from “underwriter’s” liability.
- Form 5500 and audit challenges.



## Alternative Documents

- Centralize plan document services as a requirement of participating in the program
  - Plan document needs to reflect the manner in which the allocation of authority is delegated, usually in a non-traditional way
  - Difference from MEP: aggregation in MEP is done under a plan. It is accomplished by the same form of plan being adopted by multiple employers.



## Alternative Documents

- Standardize service contract
  - Terms tie TPA services, fiduciary services, investment platform and plan document to each other.
  - Termination terms are key.
  - Ability to terminate plan under certain circumstances as an assigned settlor function.



## Alternative Documents

- Understand role of Plan Administrator, Named Fiduciary, Investment fiduciary, operation of 3(16), 3(38) and 3(21), the “discretionary fiduciary” services.
- Follow DOL guidance on allocation of fiduciary responsibility under 2509.75-4 and 2509.75-5 and ERISA Section 405.
- Formal allocation required; make sure consistent with plan document.
- Employer “Responsibilities” specifically outlined.



## The 3(16) Alternative

- The provision of professional fiduciary services
- “3(16)” is a misnomer, and misunderstood
- A reference to Plan Administrator under Code and ERISA.
- Plan documents often assign discretionary fiduciary services beyond pure Plan Administrator functions.



## 3(16) Duties

- Authorize payment to participant.
- Notice of blackout period.
- SPD drafting and distribution.
- Document provision upon request.
- Hiring accountant.
- Provision of docs to DOL on request.
- Worksite availability of documents.
- 8955, taxes.
- SMM, SAR.



## 3(16) Duties

- QDRO
- QTA
- 404a-5 compliance
- 404(c) compliance
- 408(b)(2) “covered Plan Administrator”
- Top Hat Filing
- Form 5500 filing



## Enabling Fiduciary Services

- Access and control of data, documents and workflows critical to appropriate delegation.
- Pay particular attention to compensation, including revenue sharing
- Must maintain fiduciary infrastructure (e.g., replica of committee process; claims and appeals process)



## Enabling Fiduciary Services

- Centralized investment platform and investments important to success of program.
  - Use of collective investment platforms: 81-100 trusts, group annuity contracts
  - Recordkeeping platform needs to support function
  - Maintaining ability to appoint and remove investment advisers and managers to be done with caution.





## Audit Downside

- IRS/DOL use Forms 5500 to select plans for audit
  - 1,000 adopting employers with separate 5500s = 1,000 opportunities for plan to be selected for audit
  - Separate plans under ERISA, so DOL likely to look only at individual employer
  - Single plan under the Code, though IRS could look at entire plan including all adopters



## Transitioning Between Programs

- Moving from existing contracts and plan documents.
- Selective use of negative consent.
- Transitioning the investment vendor



## The 403(b) MEP

- ERISA applies, but regulation references 413(c) of the Code.
- 413(c) of the Code does not apply to 403(b)
- Nothing preventing collecting assets together.



Questions?

