Exh. SKH-04
Docket TP-250574
Witness: Susan Hoffman

BEFORE THE STATE OF WASHINGTON

UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PUGET SOUND PILOTS, Respondent.	Docket No. TP-250574

EXHIBIT TO TESTIMONY OF

Susan Katz Hoffman

ON BEHALF OF

PACIFIC MERCHANT SHIPPING ASSOCIATION

84 Fed. Reg. 147 (July 31, 2019)

December 16, 2025

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: Final rule.

SUMMARY: This document contains a final regulation under title I of the Employee Retirement Income Security Act (ERISA) that expands 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 multiple employer workplace retirement plan under title I of ERISA (as opposed to providing an arrangement that constitutes multiple separate retirement plans). The final regulation does this by clarifying that employer groups or associations and PEOs can, when satisfying certain criteria, constitute ''employers'' within the meaning of ERISA for purposes of establishing or maintaining an individual account ''employee pension benefit plan'' within the meaning of ERISA. As an ''employer,'' a group or association, as well as a PEO, can sponsor a defined contribution retirement plan for its members (collectively referred to as ''multiple employer plans'' or ''MEPs'' unless otherwise specified). Thus, different businesses may join a MEP, either through a group or association or through a PEO. The final regulation also permits certain working owners without employees to participate in a MEP sponsored by an employer group or association. The final rule primarily affects groups or associations of employers, PEOs, plan participants, and plan beneficiaries. It does not affect whether groups, associations, or PEOs assume joint-employment relationships with member-employers or client employers. But it may affect banks, insurance companies, securities broker-dealers, record keepers, and other commercial enterprises that provide retirement-plan products and services to ERISA plans and plan sponsors.

DATES: This final regulation is effective on September 30, 2019.

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

SUPPLEMENTARY INFORMATION:

A. Background

1. Need To Expand Access to Workplace Retirement Plans

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]

Cost and regulatory complexity discourage employers—especially small businesses—from offering workplace retirement plans for their employees. Establishing and maintaining a plan can be 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 often cite annual reporting costs and exposure to potential fiduciary liability as major impediments to plan sponsorship. [8]

Although there are ways to save for retirement outside of the workplace, none are as advantageous to workers as employment-based plans. IRAs, for example, are not comparable to workplace retirement savings options. As compared to IRAs, ERISA-covered retirement plans offer private sector workers: (1) Higher contribution limits; (2) generally lower investment

[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 (*https://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-unitedstates-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/employerbarrierstoandmotivations.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.'').

[8] Two other types of pension arrangements share features of MEPs, but are not the focus of this rule. First, 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. Second, Pre-Approved Retirement Plans, are plans that providers, such as financial institutions, make available for adoption by employers and that have been pre-approved by the IRS. 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 centralized administration services and pool the assets of different plans into a central investment fund, such as an IRS Rev. Rul. 81–100 group trust.

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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 enhance employers' ability to choose among a wide variety of plan features and the flexibility to tailor retirement plans to meet their business and employment needs.

Although many MEPs already exist, past sub-regulatory guidance issued by the Department and uncertainty about the ability of PEOs and associations to sponsor MEPs as ''employers'' may have hindered the creation of MEPs. As the Department also learned through its ''association health plan'' rulemaking process (AHP Rule), described in section 3 of this preamble, many employer groups and associations are interested in offering employee benefits to their members, but view the Department's prior interpretive guidance as too restrictive, creating an undue impediment to greater sponsorship of retirement plans. Likewise, we understand that an active PEO industry already exists [9] 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.

2. Legislative Activity

In recent years, members of Congress have also sought to promote MEPs through legislation, including recent legislative proposals that address so-called ''open MEPs,'' which are plans that cover employees of employers with no relationship other than their joint participation in the MEP. Since the publication of the proposal and the beginning of the 116th Congress, seven bills dealing with this topic have been introduced, including H.R. 1994, the ''Setting Every Community Up for Retirement and Enhancement Act of 2019,'' commonly known as the ''SECURE Act,'' which was passed overwhelmingly by the House of Representatives on May 23, 2019 by a vote of 417–3.[10] The SECURE Act, in relevant part, makes comprehensive changes to ERISA and the Code to facilitate open MEPs. The final rule differs in significant ways from the legislative proposals introduced in Congress. In particular, this rule is significantly more limited in scope 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 Code.

3. Association Health Plan Rule

As mentioned above, 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.'' 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).[11] 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 scope of that rule or a new rule. In the AHP Rule, the Department said it would consider those comments in the retirement plan context.[12]

4. Executive Order 13847

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 nontraditional 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 has authority to interpret the statutes it administers, and it believes that it is appropriate to clarify how the statutory definition of ''employer,'' 29 U.S.C. 1002(5), should apply to certain MEPs under title I of ERISA. For several reasons, the Department has chosen to retain nearly the same criteria for these MEPs that it proposed. The Department is not opining, however, on whether other types of MEPs with different or less-stringent criteria, or different ''employers,'' may also qualify under title I. The Department had previously issued subregulatory guidance interpreting this section 3(5) of ERISA 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 expects to improve access to employer-

[9] The IRS has already recognized that a PEO may offer a MEP for its clients under the Code. See IRS Rev. Proc. 2002–21 (describing steps that may be taken to ensure the qualified status of defined contribution multiple employer plans maintained by PEOs).

[10] The SECURE Act had originally been introduced on March 22, 2019 on a bipartisan basis by House Ways and Means Chairman Richard Neal (D–MA), Ranking Member Kevin Brady (R–TX), Rep. Mike Kelly (R–PA) and Rep. Ron Kind (D–WI). The SECURE Act contains the MEP provisions found in S. 972/H.R. 1007, the ''Retirement and Enhancement Savings Act of 2019'' or ''RESA,'' introduced by Senate Finance Committee Chair Charles Grassley (R–IA) and Ranking Member Sen. Ron Wyden (D–OR) on April 1, 2019 and Rep. Ron Kind (D–WI) and 38 cosponsors on February 6, 2019, respectively, and H.R. 1084, the ''Family Savings Act,'' introduced in February 7, 2019 by Rep. Mike Kelly (R–PA) and 9 cosponsors. The other three MEP bills introduced in the 116th Congress are H.R. 198, the ''Retirement Security for American Workers Act,'' introduced by Reps. Vern Buchanan (R–FL) and Ron Kind (D–WI) on March 27, 2019; S. 1101, the ''Small Business Employees Retirement Enhancement Act, introduced by Sens. Tom Cotton (R–AR), Todd Young (R–IN), and Doug Jones (D–AL) on April 3, 2019; and S. 321, the ''Retirement Security Act of 2019, introduced by Sens. Susan Collins (R–ME) and Maggie Hassan (D–NH) on February 4, 2019. In the 115th Congress, there were eight bills introduced containing MEP provisions.

[11] 83 FR 28912 (June 21, 2018). In *State of New York* v. *United States Department of Labor,* 363 F. Supp. 3d 109 (D.D.C. March 28, 2019), the District Court vacated portions of the Department's final rule on AHPs. The Department disagrees with the District Court's ruling and an appeal has been filed.

[12] *Id.* at 28964, n.10.

sponsored retirement savings plans in America.

The Department, therefore, is publishing this final rule interpreting the term ''employer'' for purposes of ERISA section 3(5). This rule facilitates the adoption and administration of MEPs and thereby expands access to workplace retirement plans, especially for employees of small and mid-size employers and for certain self-employed individuals. This final rule supersedes any preexisting subregulatory interpretive rulings under ERISA section 3(5) pertaining to bona fide groups or associations of employers and, at the same time, establishes more flexible standards and criteria for sponsorship of MEPs than currently articulated in that prior guidance. The final rule does not affect existing auto-enrollment options and other features that make defined contribution plans attractive for employers. The final rule also has no superseding effect on Interpretive Bulletin 2015–02, as further explained below in the ''Miscellaneous'' section of this preamble.

5. Notice of Proposed Rulemaking

On October 23, 2018, the Department published a proposed regulation (''Proposed Rule'') to clarify certain circumstances under which an employer group or association or a PEO may sponsor a MEP. More specifically, the Proposed Rule clarified 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 ''employee pension benefit plan'' within the meaning of ERISA section 3(2). Under the terms of the Proposed Rule, a group or association, as well as a PEO, could sponsor a MEP as an ''employer.'' The Proposed Rule permitted different businesses to join a MEP, either through a group or association or through a PEO. The Proposed Rule also permitted certain working owners without employees to participate in a MEP sponsored by a group or association.

The Proposed Rule identified the potential advantages of scale offered by MEPs. MEPs have the potential to broaden the availability of workplace retirement plans, especially among small employers, because they enable different businesses to band together and adopt a single retirement plan. Pooling resources in this way can reduce costs and encourage 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.

The Proposed Rule also identified other potential advantages of MEPs. 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 retain fiduciary responsibility for choosing and monitoring the arrangement and forwarding required contributions to the MEP, the employer can keep more of its day-to-day focus on managing its business, rather than the MEP.

Under the Proposed Rule, participating employers were generally 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 participating employers were not viewed as sponsoring their own separate, individual plans under ERISA. Rather, the MEP, if it met the conditions of the Proposed Rule, constituted a single employee benefit plan for purposes of title I of ERISA. Consequently, the MEP sponsor—and not the individual participating employers—generally was 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 had to act as plan administrators under ERISA section 3(16) or as named fiduciaries under section 402 of ERISA.

The Proposed Rule provided that an employer group or association or PEO could act 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 the Proposed Rule is 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, a MEP also has to satisfy the requirements of section 210(a) of ERISA.

6. Legal Background

a. 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, as relevant here, to an ''employee benefit plan'' sponsored ''by any employer.'' ERISA section 4(a)(1); 29 U.S.C. 1003(a)(1).[13] The provision reads in relevant part: ERISA ''shall apply to any employee benefit plan if it is established or maintained by any employer engaged in commerce or in any industry or activity affecting commerce . . . .'' 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 income to the termination of employment or beyond. Thus, the term ''employer'' is essential to a benefit arrangement's status as an ''employee pension benefit plan'' within the meaning of ERISA. A prerequisite for 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, in relevant part, states that 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 carried forward this important definition from the 1958 Welfare and Pension Plans Disclosure Act. Public Law 85–836, section 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

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

problematic for some courts. They ''have found the phrase 'act . . . indirectly in the interest of an employer' difficult to interpret.'' *See 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) (collecting cases). Also ambiguous is the statutory 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 well-positioned to address this statutory ambiguity by exercising its rulemaking authority, *see* 29 U.S.C. 1135, 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.

b. Bona Fide Groups or Associations

The Department has long taken the position in subregulatory guidance 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.[14] DOL guidance generally refers to these entities—*i.e.,* entities that qualify as groups or associations, within the meaning of section 3(5)—as ''bona fide'' employer groups or associations.[15] 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.[16] Largely, but not exclusively, in the context of welfare-benefit plans, the Department has previously distinguished employer groups or associations that can act as ERISA section 3(5) employers in sponsoring multiple employer plans 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 plan that is unrelated to the provision of benefits.[17]

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.

c. 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.'' [18] 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 client contract, the PEO assumes responsibility for paying the employees and for related employment tax compliance, and has attendant 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.[19] According to a representative of the PEO industry, 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.

(i) 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). 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).[20] The different statutory text and the differences in the nature of the employer relationships merit a different regulatory approach to PEOs than to employer groups or associations.

(ii) Current Secondary Legal Authority

Some federal statutes treat a PEO as an ''employer'' for certain 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

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

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

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

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

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

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

[20] 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).

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.[21] 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.

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 certifies PEOs that meet certain requirements within the Code and provides a level of assurance to small-business owners that rely on such a Certified Professional Employer Organization (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. Pursuant to its certification as a CPEO, 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)).'' [22]

B. Overview of the Final Rule and Discussion of Public Comments

1. In 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 in the final rule, offer many small businesses more affordable and less burdensome retirement savings plan alternatives than are currently available. MEPs provide another avenue for those employers that are reluctant to shoulder such burdens. In addition, the final rule will 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. Accordingly, the Department is confident that the final rule will prompt some small businesses that do not currently offer workplace retirement benefits to offer such benefits. This will increase the number of employees enrolled in workplace retirement plans, thereby offering some of America's workers better retirement savings opportunities and greater retirement security.

Paragraph (a) defines the scope of the final rule. This paragraph provides that bona fide employer groups or associations and bona fide PEOs may act as ''employer[s]'' under ERISA section 3(5) for purposes of sponsoring a MEP. This interpretation is based upon the Department's conclusion that such bona fide employer groups, associations, or PEOs can act ''in the interest of'' their employer members in relation to a retirement savings plan.

Although the term ''multiple employer plan'' can refer to a variety of different kinds of employee-benefit arrangements, this final rule addresses only two kinds of arrangements: Sponsorship of a MEP by either a group or association of employers, or by a PEO. The final rule is also limited to defined contribution plans, as defined in section 3(34) of ERISA. The final rule does not cover welfare benefit plans or other types of pension plans.

Some commenters recommended expanding the scope of the Proposed Rule so that the final rule would cover other employee benefit plans. These commenters mentioned life, disability, and defined benefit pension plans in particular. At the same time, however, other commenters recommended that this rulemaking project remain limited to defined contribution plans. These commenters stated that different issues might arise under different employee benefit plan structures and different benefit options. These commenters preferred that the Department continue a discussion with interested parties on whether and how to implement a future regulatory expansion to cover these other employee benefit plans. After thoughtful review of these comments, however, the final rule is limited to defined contribution plans because the Department believes that consideration and development of any proposal covering other types of pension and welfare benefit plans or other persons or organizations as plan sponsors would benefit from public comments and additional consideration by the Department.

2. Open MEPs and Request for Information

The Proposed Rule solicited comments on so-called ''open MEPs'' or ''pooled employer plans,'' which generally are defined contribution retirement arrangements that cover employees of employers with no relationship other than their joint participation in the MEP. The Proposed Rule specifically requested comments on whether, and under what circumstances, these arrangements should and could be operated as ERISA-covered plans. The solicitation asked commenters who believe that these arrangements should be addressed in this or a future rulemaking to 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 were encouraged to provide suggestions regarding the regulatory conditions that should apply to these particular arrangements.

Nearly half of the comments received addressed this issue, and the majority were supportive of the Department promulgating a rule that would facilitate these arrangements. Nonetheless, commenters had very different ideas on how the Proposed Rule might best be amended to facilitate open MEPs. Some commenters, for example, recommended eliminating some or all of the substantial business purpose, control, and commonality requirements from the Proposed Rule's bona fide group or association provisions, and the provision that prohibits financial services firms from being the group or association that establishes the MEP. Other commenters, however, recommended modifications to, and an expansion of, the Proposed Rule's bona fide PEO provisions. These commenters argued that the bona fide PEO framework, with appropriate modifications, could be expanded beyond the narrow scope of PEOs to include commercial enterprises more generally. To these commenters, a commercial entity's willingness to exert substantial control over the functions and activities of the MEP, as the plan sponsor, plan administrator, and as a named fiduciary provides a sufficient basis to conclude that such an entity is acting ''indirectly in the interest of an employer . . . in relation to an employee benefit plan'' for purposes of section 3(5) of ERISA, without regard to whether the entity is a PEO.

Not all commenters, however, supported the idea of open MEPs. A number of commenters believed commercial entities and financial services firms should be precluded from

[21] 29 CFR 825.106(b)(2), (e).

[22] *See* IRC section 3511(a)(1).

sponsoring MEPs as an ''employer'' under section 3(5) of ERISA. A few commenters viewed the matter as being better suited for legislation, given the wide range of issues presented under ERISA and the Code.

After reviewing the comments, the Department is persuaded that open MEPs deserve further consideration. The Department, however, does not believe that it has acquired a sufficient public record on, or a sufficiently thorough understanding of, the complete range of issues presented by the topic. In light of the conflict in the comments about whether and how to permit open MEPs, as well as legislation pending in the 116th Congress, the Department has decided to solicit comments on a broad range of issues relating to open MEPs in a Request for Information (RFI) published elsewhere today in the **Federal Register** for possible future rulemaking and to defer rulemaking on open MEPs until after a fuller public record is developed. Because of its interest, however, in expanding opportunities for small businesses and working owners to participate in MEPs as soon as possible, the Department is publishing this final rule today, which is limited to bona fide groups or associations and bona fide PEOs that may act as employers that establish and maintain MEPs.

3. Bona Fide Groups or Associations of Employers

Paragraph (b) of the final rule contains the provisions defining what is a bona fide group or association of employers capable of establishing a MEP. [23] These provisions replace and supersede criteria in prior subregulatory guidance dealing with retirement plans and bona fide groups or associations of employers. The criteria in paragraph (b) distinguish bona fide group or association MEPs from retirement products and services offered by purely commercial pension administrators, managers, and record keepers. 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. ERISA section 3(5) and ERISA title I's overall structure contemplate *employment*-based benefit arrangements.[24] 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.[25] Thus, the criteria in paragraph (b) identify certain groups and associations that act as employers within the meaning of ERISA section 3(5), and distinguish those groups and associations from others that may not act as an ''employer.''

The provisions in paragraph (b) generally mirror those in the final AHP Rule that define what is a bona fide group or association capable of establishing an association health plan.[26] These provisions have the same meaning and effect here, as they have there. It makes sense to have consistent provisions for AHPs and MEPs, because the Department is interpreting the same definitional provisions in both contexts and because many of the same types of groups or associations of employers that sponsor AHPs for their members will also want to sponsor MEPs. Accordingly, and for the sake of regulatory uniformity and simplicity, if a group or association of employers can establish a bona fide AHP under the AHP Rule, the group or association should also be able to establish a MEP under this final rule.

Although commenters suggested changes to the provisions in paragraph (b) of the Proposed Rule, the final rule adopts the provisions essentially as proposed. In many instances, the rationale for declining a particular suggested change or amendment is the same or substantially similar to the reason the Department declined the same proposed provision in connection with the AHP Rule. After thoughtful consideration, the Department has generally determined that the rationale for declining a particular suggested change or amendment in the AHP context is applicable in the MEP context, unless otherwise specified. Accordingly, the major comments on the proposal and provisions of the final rule are discussed below.[27]

a. Purpose of the Association

Paragraph (b)(1)(i) of the Proposed Rule required that a group or association of employers 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, even if the primary purpose of the group or association is to offer such coverage to its members. This provision helps ensure that the association is a bona fide association of employers, rather than merely a commercial arrangement or entity marketing retirement benefits and services to customers on a commercial basis. The ''primary purpose'' provision recognizes that it is perfectly legitimate for associations to form, in part, as a means of achieving the sorts of economies of scale, bargaining power, and administrative expertise that enable them to provide valuable benefits to their members, as long as they also serve another unrelated substantial business purpose. As an additional guidepost, the paragraph specifically provides that the ''substantial business purpose'' test is satisfied if the group or association would be a viable entity, even in the absence of sponsoring an employee benefit plan.

A number of commenters believe this standard is too lenient. One commenter, who believes this standard may be abused by profit seeking enterprises, recommended a stricter standard providing that the primary purpose of the group or association could not be offering or providing retirement benefits. Other commenters with similar concerns recommended that the final regulation limit eligible groups or associations of employers to groups or associations that are not-for-profit organizations. One individual believes the standard is undefined, lacks meaningful limitations, and is perfunctory, and that it would allow an

[23] 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.

[24] The Department took the same position in the AHP Rule. 83 FR 28912, 28913 (June 21, 2018).

[25] *Id.* at 28916.

[26] The final 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 potential 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, and a few commenters expressly agreed with the Department, that any relevant nondiscrimination concerns are already addressed in the tax-qualification provisions of the Code or other federal laws.

[27] Many commenters who support open MEPs made recommendations to substantially modify or eliminate some or all of the provisions in paragraph (b) of the final rule as a way of achieving an open MEP framework. Those comments are addressed in the aggregate above in section B 2 of this preamble, and in the related RFI published elsewhere in today's **Federal Register**. They are not addressed in this section of the preamble.

association to exist for the sole purpose of plan sponsorship.

It remains the Department's view, however, that requiring a substantial business purpose unrelated to offering employee benefits strikes an appropriate balance. It appropriately separates out the sorts of bona fide associations of employers that Congress intended to cover from solely commercial operations; promotes expanded access to MEPs; and minimizes the danger of abuse. The ''substantial purpose'' test is not a lenient standard, as reflected by the safe harbor for associations that would be viable even if they did not provide employee benefits. Thus, an entity that exists solely to sponsor a MEP would never qualify under the safe harbor. The importance of this safeguard should not be underestimated. In the Department's experience under ERISA, many (if not most) regulated entities opt to meet the requirements of safe harbor provisions, even if more stringent than other legally defensible approaches, in exchange for the legal certainty that comes from safe harbor compliance.

More importantly, the commenters overlooked the important modifier—''substantial''—in the phrase ''substantial business purpose.'' For an organization's business purpose other than offering employee benefits to be ''substantial,'' it must be *of considerable importance* to the group or association.[28] Perfunctory or *insubstantial* purposes are clearly insufficient to meet the test. The viability safe harbor provides an indication of just how substantial the other purpose must be to meet the rule's terms.

The Department recognizes, however, that it may not always be easy to determine if an association would be viable if it did not offer employee benefits; that associations may serve multiple other purposes; and that the extent to which other purposes support the organization's viability may vary from year to year based on all sorts of internal and external factors. Accordingly, a purpose other than MEP sponsorship does not have to be the lifeline of the organization in order to be ''substantial.'' It must, however, be of considerable importance to the existence of the organization—not merely ''important,'' but of ''considerable'' importance. The Department expects that, in practice, organizations may have numerous other purposes depending on the type and size of the organization.

Ultimately what is ''substantial'' or ''of considerable importance'' to a group or association of employers depends on the facts and circumstances of the particular situation, taking into account the particular organization and its stated mission as reflected in its formal organizational structure and by-laws. But in each instance, the ''other'' business purpose(s) or activity must be substantial enough that the association *could,* under different circumstances, be a viable entity even in the absence of sponsoring a MEP. This is true even if the viability of the association as currently structured depends on offering and providing MEP coverage to its members. For example, if the group or association operated with an active membership before sponsoring a MEP, that would be compelling evidence of such a substantial business purpose, even if its primary purpose in the future becomes offering and providing MEP coverage to its members. The organization's earlier operations demonstrate that the association *could* be viable in the absence of offering and providing MEP coverage, assuming the organization continues its pre-MEP activities.

Importantly, the final rule includes conditions which, when combined with the ''substantial business purpose'' standard, will protect participants and beneficiaries from the concerns identified by the commenters. These other conditions include the requirement that the functions and activities of the group or association must be controlled by its employer members. For all of the foregoing reasons, paragraph (b)(1)(i) of the Proposed Rule is adopted without change.

Commenters indicated that it may be a common practice for such groups or associations to form wholly owned non-profit corporations for the sole purpose of establishing and maintaining benefit programs for their members. In these circumstances, the group or association has a mechanism to appoint the board of directors of the affiliated corporation from among members of the group or association, according to the commenters. Commenters requested clarification as to whether the substantial business purpose test precludes a group or association of employers from using a wholly owned affiliate to administer a MEP in this manner. They also pointed out that there are prudent business reasons for adopting this type of delivery structure, including that the affiliated corporation can focus exclusively on administering retirement benefits and catering to the specialized needs of plan participants and retirees, while the group or association focuses on promoting and advancing the related, but different business purposes of the group or association. It is not inconsistent with the substantial business purpose test, in the Department's view, if a group or association with a substantial business purpose unrelated to offering and providing MEP coverage or other employee benefits were to create a wholly owned subsidiary to administer a MEP, even if the subsidiary exists solely to administer the MEP. In this circumstance, the group or association's substantial business purpose unrelated to the provision of employee benefits is not affected by its decision to create a subsidiary under its control to administer the MEP. This analysis also assumes that the other requirements of the final rule are satisfied, including the requirement that the group's or association's employer members that participate in the plan control the plan, both in form and substance.

b. Groups or Associations of Individuals

Paragraph (b)(1)(ii) of the Proposed Rule required that each employer member of the group or association participating in the plan be a person acting directly as an employer of at least one employee who is a participant covered under the plan. At least two commenters requested that the final regulation be expanded to cover groups or associations whose members include, not just employers and working owners, but also individuals who are not working owners and whose employers do not participate in the group or association. These commenters assert that membership in associations often includes individuals who are common law employees of employers that are not also members of the association. These associations desire to permit these individuals to enroll in the MEP, according to the commenters. The commenters argued that otherwise, the Proposed Rule unduly limits the ability of these associations to offer MEPs to all of their members, including small employers, independent contractors, and sole proprietors who could otherwise benefit from the final rule's extended coverage of ''working owners.'' Regardless of the policy merits of these arguments, 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

[28] *Compare, substantial,* Oxford Dictionary (2019), *https://en.oxforddictionaries.com* (last visited Apr. 24, 2019) (of considerable importance) with, *substantial,* Merriam-Webster (2019) *https://www.merriam-webster.com* (last visited Apr. 24, 2019) (consisting of or relating to substance).

employers. Thus, the final rule, like ERISA section 3(5), is limited to employers, including working owners, because the Department cannot expand its definition beyond the statute's scope. Accordingly, paragraph (b)(1)(ii) of the Proposed Rule is adopted in the final rule without change.

c. Formal Organizational Structure

Paragraph (b)(1)(iii) of the Proposed Rule required a group or association to have ''a formal organizational structure with a governing body'' as well as ''by-laws or other similar indications of formality'' appropriate for the legal form in which the group or association operates in order to qualify as a bona fide group or association. The Department received no comment letters on this provision. Commenters on the mirror provision in the AHP Rule generally supported these provisions on the basis that having such formalities will not only serve to clarify the rights and obligations of members of the group or association, but to promote accountability by enabling regulators and others to readily identify those parties who are responsible for operations, including the establishment and maintenance of the group health plan. These commenters suggested that the existence of formalized and robust organizational structures could be an important form of protection against fraud and insolvency. The Department agrees with the commenters that the requirements of paragraph (b)(1)(iii) promote accountability and provide support against fraud and insolvency. The provision also ensures that the organization is a genuine organization with the organizational structure necessary to act ''in the interest'' of participating employers with respect to the MEP as the statute requires. For these reasons and to maintain consistency with the AHP Rule, the Department adopts these provisions in this final rule without modification.

d. Participating Employer Control Over the Group or Association

Paragraph (b)(1)(iv) of the Proposed Rule required that member employers control the functions and activities of the group or association, and that the employer members that participate in the plan control the plan. Control must be present both in form and in substance. One commenter recommended that the final rule state that the control test may be satisfied indirectly through the regular nomination and election of directors, officers, or other similar representatives that control such functions and activities. The implicit concern raised by this commenter is that the control test, as proposed, could be construed as requiring that participating employers be responsible for management and day-to-day operations of the group or association and MEP in order for the group or association to qualify as bona fide.

The final rule does not require group or association members to manage the day-to-day affairs of the group or association or the plan in order for the group or association to qualify as bona fide. As has long been the case, the Department will consider all relevant facts and circumstances in determining whether the functions and activities of the group or association are sufficiently controlled by its employer members, and whether the employer members who participate in the group or association's pension plan sufficiently control the group plan. In the Department's view, the following factors, although not exclusive, are particularly relevant for this analysis: (1) Whether employer members regularly nominate and elect directors, officers, trustees, or other similar persons that constitute the governing body or authority of the employer group or association and plan; (2) whether employer members have authority to remove any such director, officer, trustees, or other similar person with or without cause; and (3) whether employer members that participate in the plan have the authority and opportunity to approve or veto decisions or activities which relate to the formation, design, amendment, and termination of the plan, for example, material amendments to the plan, including changes in coverage, benefits, and vesting. The Department ordinarily will consider there to be sufficient control if these three conditions are met.[29]

The same commenter suggested that the final rule could contain a deeming provision under which the control test would be considered satisfied if, in the absence of actual control, it could be demonstrated that the group or association otherwise acts in the interest of its employer-members in relation to such a plan, including but not limited to demonstrating the existence of a fiduciary or contractual duty to act in the plan's interest. Whether group or association members in fact have sufficient control of the functions and activities of the group or association for it to be considered bona fide, however, is entirely independent of and unrelated to whether the group or association's key officials or board members are fiduciaries of the MEP. For these reasons, the Department declines to adopt the suggestions of these commenters.

e. Commonality of Interest

Paragraph (b)(1)(v) of the Proposed Rule required that the employer members of the group or association of employers have commonality of interest. Paragraph (b)(2)(i)(A) of the Proposed Rule recognized commonality if the employers are in the same trade, industry, line of business or profession. Alternatively, paragraph (b)(2)(i)(B) of the Proposed Rule recognized commonality if 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).

(i) Commonality Based on Size

Commenters suggested the final rule should contain a new provision that finds sufficient commonality based on the ''small'' size of the participating employers, regardless of the small firms' type of business or location. Some of these commenters would include in this category businesses with no employees other than the owner. According to the commenters, small employers often share unique bonds, interests, needs, and regulatory schemes, and may have significantly more commonality of interest than those in the same industry or region due solely to their size.

The Department does not agree that this characteristic should be included as additional commonality of interest criteria in the final rule. A test that would treat all small businesses—including sole proprietors/working owners—nationwide as satisfying the standard based on size alone—without regard to their products, services, lines of business, or location—would be too open-ended to establish the requisite commonality of interest. Moreover, to the extent this class of business is not part of a single trade, industry, line of

[29] A number of commenters requested clarification or confirmation that the control test would be satisfied in an array of fact patterns involving different control structures, membership classifications, and participation privileges, including subgroup structures and associations of groups or associations. As stated elsewhere in this preamble, control must be present both in form and in substance, and whether control exists is determined under a facts and circumstances test. The Department declines in this preamble to address the application of the final rule to specific fact patterns. As noted above, the Department has procedures to answer inquiries of individuals or organizations affected, directly or indirectly, by ERISA as to their status under ERISA and as to the effect of certain acts and transactions. *See* ERISA Advisory Opinion Procedure 76–1 (FR Doc. 76–25168).

business, or profession, the geography standard for establishing a commonality of interest at paragraph (b)(2)(i)(B) of the final rule already provides this class of business with the ability to form State-wide and metropolitan area groups and associations that qualify as an employer for purposes of sponsoring a MEP. Accordingly, this suggestion was not adopted. Commenters on the RFI, however, are invited to include additional comments on this topic in the context of open MEPs.

(ii) Commonality Based on Industry

Paragraph (b)(2)(i)(A) of the Proposed Rule recognized commonality if the employers are in the same trade, industry, line of business, or profession. This reflects that employers in the same trade or industry, not only produce the same or similar products or services, but that they also tend to share, among other things, similar regulatory and market environments, economic trends, collective bargaining, and other similar business challenges that in turn may bear on the provision of benefits to their employees. Because of these shared traits, employers in the same trade or industry routinely associate in various industry or trade groups, and have done so historically. One commenter on the AHP Rule, for example, reported a membership of more than 7,000 trade associations. This commenter, which is an association of associations, stated that there is an organization or association for every industry and profession in the United States, and that over 60,000 are organized under Code section 501(c)(6) as trade associations and business leagues. As of 2017, the Internal Revenue Service recognized more than 63,000 Code section 501(c)(6) trade and professional associations.[30]

Commenters requested that the Department clarify whether businesses that support a particular industry, or that are allied with a particular industry, are considered to be ''in the same industry'' as that term is used in paragraph (b)(2)(i)(A) of the Proposed Rule. For example, one commenter notes that an association of home builders that includes builders and developers might also include a wide variety of professionals, artisans, and tradespeople, such as plumbers, carpenters, and electricians, who support the home building and development industry. In addition, another commenter notes that an association of owners and operators of vending machine companies might also include vending machine manufacturers and vending machine suppliers, who support and are allied with the owners and operators of the vending machine companies. These commenters request clarification so that persons interested in forming MEPs would have more certainty regarding the permissible scope and membership classifications that would satisfy the final rule.

Determinations of what is a ''trade,'' ''industry,'' ''line of business,'' or ''profession,'' as well as whether an employer fits into one or more these categories, are based on all the relevant facts and circumstances. In general, the Department intends for these terms to be construed broadly to expand employer and employee access to MEPs. Absent future guidance to the contrary, the Department ordinarily will not challenge any reasonable and good faith industry classification or categorization adopted by the group or association of employers. Nor will the Department challenge the inclusion of ''support'' or ''allied'' businesses as members of the group or association if they share a genuine economic or representational interest with the other members. The Department declines in the preamble to address the application of the final rule to specific fact patterns. The Department has procedures to answer inquires of individuals or organizations affected, directly or indirectly, by ERISA as to their status under ERISA and as to the effect of certain acts and transactions. See ERISA Advisory Opinion Procedure 76–1 (FR Doc. 76–25168).

(iii) Commonality Based on Geography

Paragraph (b)(2)(i)(B) of the Proposed Rule contained a geography test. It recognized commonality if 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).

Commenters recommended broadening the geography test in two different ways. Some commenters recommended expanding the geography test to allow regional commonality, rather than the state-based approach taken in the Proposed Rule. For this purpose, these commenters recommended using the regional divisions used by the U.S. Census Bureau, the districts used by the Federal Reserve, or the regions used by the Bureau of Economic Analysis. Alternatively, some commenters recommended expanding the geography test so that a MEP for employers in a metropolitan area that crosses two or more states would not need to exclude employers in those states that are located outside the metropolitan area. The first recommendation would foster large regional MEPs, potentially increasing economies of scale compared to state-based MEPs. The second recommendation would help employers in suburban and rural areas of states that may not have access to a statewide MEP. Because of the similarities between these recommendations and other ideas being explored in the RFI on open MEPs published elsewhere in today's **Federal Register**, the Department defers action on these recommendations. These recommendations provide a wide variety of other ways the Department could draw these lines, and the Department believes these issues would benefit from an additional opportunity for public comment. Accordingly, the Department includes a comment solicitation in the RFI on group or association MEPs covering larger geographic regions to ensure a fully developed public record before considering or taking any further action.

Some commenters opposed the geography test due to its breadth. These commenters argued that this test in effect establishes fictional commonality among employers, because it is based on the simple fact that their businesses reside in the same state, regardless of the state's size or population. To these commenters, shared geography alone is not an indicator of commonality of business or economic interests among a state's inhabitants and should not be considered a sufficient nexus to establish commonality. These commenters fear that geography-based commonality will lead to the establishment of large MEPs by state or even regional associations with large numbers of participating members that have virtually nothing in common other than location and no meaningful industry, professional, or business ties. The commenters expressed concern that the geography test will enable and result in the establishment of purely commercial arrangements by promoters with only pecuniary interests in participating members and participating members with only tenuous and remote connections and ties among themselves, all of which ultimately could result in an increase in arrangements that are susceptible to financial mismanagement, insolvency, and lack of fiduciary oversight. These commenters, therefore, recommended eliminating the geography test.

The Department does not agree with these commenters that geography alone has no binding or cohesive impact on businesses. It seems plain that employers in the same geography share

[30] Internal Revenue Service Data Book, 2017, p. 57, Publication 55B Washington, DC (March 2018) (*https://www.irs.gov/pub/irs-soi/17databk.pdf*).

common interests concerning employees' education and workforce development, taxation, transportation and commuting networks, the legal and regulatory environment, human capital pool, physical environment, local and state economic development partnerships, collective bargaining, and myriad other regional business trends and issues. That geography is a natural basis around which businesses organize themselves is evident in the number of state and local chambers of commerce in the United States, and their enrollment. There are roughly 4,000 chambers of commerce in the United States.[31] The territorial nature of these organizations speaks directly to the correlation between geography and common interests.

Nor does the Department agree that it makes sense to eliminate the geography test. A primary purpose of the geography test is to make it easier for employers to band together and collectively benefit from the economies of scale that come from aggregation. Eliminating the geography test would undermine this intended benefit. Moreover, the geography test in the final rule also aligns with the geography test in the AHP Rule, thus making it possible for statewide groups and associations to better serve their members by offering access to both health and retirement benefits. Consequently, eliminating the geography test would undermine that member service opportunity as well.

Nor does the Department agree that narrowing the geography test is necessary to guard against fraud and abuse. The final regulation contains numerous safeguards to prevent large aggregations of completely unrelated employers in MEPs and potential mismanagement and fraud. The final rule, for example, prohibits financial services firms from being the group or association that establishes the MEP, requires that functions of the group or association be controlled by employer members, requires the group or association to have a substantial business purpose other than providing benefits, and makes clear that the parties administering the MEP must fully adhere to ERISA's fiduciary standards. These provisions adequately guard against the concerns raised by the commenters, and ensure that the group or association will represent the common interests of its employer members.

[31] According to the Association of Chamber of Commerce Executives (*https://secure.acce.org/about/chambers-of-commerce/*).

One commenter noted that the Seventh Circuit invalidated a geography-based condition for ''voluntary employees' beneficiary associations'' (VEBAs) described in section 501(c)(9) of the Code.[32] While the commenter described that decision as applying in an analogous context, section 3(5) of ERISA and section 501(c)(9) of the Code have different language and purposes. In addition, the Department of Treasury and the IRS, rather than the Department of Labor, have jurisdiction over section 501(c)(9) of the Code.[33]

(iv) Commonality Provisions In General

Other commenters generally opposed the commonality provisions (whether based on geography or industry) because they are not expressly set forth in the statute. These commenters recommended eliminating the commonality provisions entirely, and focusing instead only on whether the group or association acts ''indirectly in the interest'' of an employer in relation to the MEP, without regard to any requirement of a common economic or representational nexus. While these commenters' arguments are not without force, the Department has decided for policy reasons not to simply eliminate these provisions.

Even assuming that criteria other than commonality could satisfy section 3(5), the commonality provisions serve important policy goals in this context. First, keeping them in this final rule for MEPs establishes uniformity with the AHP Rule, thereby promoting consistent outcomes for employer-groups interested in sponsoring both health and retirement plans for their employees. Second, since employer groups often form on geographic and industry lines, the commonality provisions should be simple and natural to implement. Third, replacing the commonality provisions with looser or tighter criteria would likely require recalibration of the other conditions in paragraph (b) the final rule, all of which are designed to work in tandem with the commonality provisions. The more lenient test recommended by these commenters, for example, would require the Department to reevaluate and potentially expand the regulatory safeguards for MEPs, possibly to include new and potentially sophisticated and extensive compliance and enforcement mechanisms. This would be especially true in the case of open MEPs sponsored by financial institutions. Before proceeding with a less restrictive test (*e.g.,* open MEPs), which is a much larger step, the Department intends to evaluate the responses to the RFI on open MEPs published elsewhere in today's **Federal Register**.

These policy objectives more than adequately justify the commonality provisions in this final rule. Similar—albeit more restrictive—commonality provisions were present in decades of subregulatory guidance preceding and effectively superseded by this final rule. The prior subregulatory guidance, which was issued to address the ambiguity in section 3(5) of ERISA, used the commonality provisions essentially to help draw a line between commercial arrangements and associations that serve employers' interests. But commonality provisions—whether in the narrower form as they existed in the subregulatory guidance or in the expanded form as they exist in this final rule—are not directly in or necessarily compelled by the statute. And their long-term use in the prior subregulatory guidance in no way restricts the Department's ability now to modify them or even replace them altogether with different criteria. As a case in point, no commonality provisions in any form are present in the portion of this final rule governing bona fide PEOs because there the Department chose other criteria that adequately demonstrate when a ''person'' is able to adequately act in the employers' interests in relation to a MEP. And, furthermore, unlike the prior subregulatory guidance, the final rule's more expansive commonality provisions are the product of extensive notice and comment rulemaking, in which the Department considered many factors and provides herein ample justification for its decisions. In the end, the regulatory process of addressing the ambiguity in section 3(5) of ERISA invariably required some measure of policy-making and line drawing, and the lines in this final rule reflect the reasoned policy judgment of the Department.

f. Provision Relating to Financial Services Firms

Paragraph (b)(1)(vii) of the Proposal Rule generally prohibited an employer group or association from being a bank, trust company, insurance issuer, broker-dealer, or other similar financial services firm (including a pension record keeper or a third-party administrator) and from being owned or controlled by such a financial services

[32] *Water Quality Association Employees' Benefit Corporation* v. *United States,* 795 F.2d 1303 (7th Cir. 1986).

[33] In response to the *Water Quality* decision, the Internal Revenue Service issued a proposed regulation at 26 CFR 1.501(c)(9)–2, which sets forth a modified geographic limitation.

firm. Nearly every commenter in favor of open MEPs opposed this prohibition. Their recommendation to remove this prohibition, when combined with their recommendations on other provisions, would achieve their favored outcome. Other commenters, however, supported this provision. Their support is based on the premise that, unlike traditional groups or associations of employers such as chambers of commerce or business leagues, which exist to serve and advance the needs of their participating members, financial services firms exist primarily to serve and advance the business interests of the company or concern, including its shareholders or other owners. Several of these commenters argued that financial services firms should not be in the business of providing MEPs because of conflicts of interest.

This provision is consistent with the AHP Rule, which in relevant part, prohibits health-insurance companies from being treated as a bona fide group or association. In that context, the Department concluded that 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. 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 final rule therefore applies a similar approach to employer groups or associations sponsoring MEPs in the final rule. The Department may revisit this issue depending on future action, if any, taken in response to the RFI on open MEPs published elsewhere in today's **Federal Register**.

4. Bona Fide PEOs

Although a number of commenters discussed the bona fide PEO provisions in the Proposed Rule, only a few comment letters actually addressed the substance of these provisions. Many commenters favoring open MEPs, for instance, raised the general concern that PEOs appeared to be given preferential treatment under the Proposed Rule. This observation came mainly from representatives of financial services firms, such as banks, insurance companies, and brokerage firms, who favor an open MEP structure. The Department does not agree that PEOs have been singled out for preferential treatment under the final rule. Rather, to the extent that PEOs stand in the shoes of their client employers for certain purposes and perform substantial employment functions on their client's behalf, the final rule merely recognizes that such PEOs are acting ''indirectly in the interest of [their client] employers'' under ERISA section 3(5) for purposes of sponsoring a MEP. Nevertheless, in response to these comments, as announced earlier in this document, elsewhere in today's **Federal Register** the Department published a RFI soliciting comments on a broad range of issues relating to open MEPs for possible future rulemaking. The RFI will give these commenters an opportunity to provide additional comments on possible extensions of the final rule. The substantive comments received in response to the Proposed Rule are addressed below in relation to the relevant provisions of the final rule.

a. The Four General Requirements

Paragraph (c) of the Proposed Regulation included four requirements 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. The final rule adopts these four requirements essentially as proposed. Paragraph (c)(1)(i) requires the PEO to perform substantial employment functions on behalf of the client employers. Paragraph (c)(1)(ii) requires the PEO to have substantial control over the functions and activities of the MEP, as the plan sponsor, the plan administrator, and a named fiduciary. Paragraph (c)(1)(iii) requires 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) requires the PEO to 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.

Regarding paragraph (c)(1)(i), a PEO's assumption and performance of substantial employment functions on behalf of its client-employers is one of the lynchpins of the final rule. Just as commonality and control help to establish the appropriate nexus for groups or associations of employers under paragraph (b) of the final rule, the PEO's performance of substantial 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 final rule 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).

Importantly, a PEO's status under the final rule does not make the PEO more or less likely to have an employment relationship (whether referred to as joint employment or otherwise) with the client-employer, for purposes of other laws or liabilities. What constitutes 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 or Fair Labor Standards Act, and neither supports nor prohibits a finding of an employment relationship in other contexts. The Department received a number of responses to its solicitation for comments on this issue. A number of commenters requested that the Department reiterate that participation in a MEP does not necessarily create a joint employment relationship by including language regarding joint employment in the operative text of the final rule. Another commenter asked that the Department state that MEP participation cannot be used as evidence of employee status for purposes of evaluating in any proceeding whether an individual is providing services as an independent contractor or employee. Although the Department recognizes the concern of commenters that participation in a MEP might create an inference under other laws, the Department's authority in issuing this final rule is limited to its interpretation of ERISA. Consequently, the operative text of the final rule, like the NPRM, does not contain a specific reference to the existence of a joint employment relationship under other laws.

Regarding paragraph (c)(1)(ii), 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 reference in ERISA

section 3(5) to a person acting as the employer ''in relation to the plan.'' Paragraph (c)(1)(ii) of the final rule requires 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 ERISA), the plan administrator (within the meaning of section 3(16)(A) of ERISA), and a named fiduciary (within the meaning of section 402 of ERISA). Looking to the PEO's substantial control of the MEP, as the sponsor, administrator, and fiduciary, is sensible given the ''in relation to the plan'' language of section 3(5) of ERISA. In response to comments, the final rule clarifies that because the PEO assumes these important statutory roles under ERISA, the PEO continues to have employee-benefit plan obligations to the employees of a client employer, as plan participants, even after that client employer no longer contracts with the PEO. The obligations of the PEO as the plan administrator and as a named fiduciary to the MEP's participants and beneficiaries does not terminate with the conclusion of a client contract between the PEO and the client employer; instead, these obligations continue until participants are no longer covered by the plan and beneficiaries are no longer receiving benefits (*e.g.,* the individuals have received a lump-sum distribution or a series of distributions of cash or other property which represents the balance of his or her credit under the plan, or a plan-to-plan transfer has occurred). As with pension plans in general, distributions are governed by the terms of the MEP as are plan-to-plan transfers.

b. Substantial Employment Functions Safe Harbor

Whether a PEO satisfies the requirement, in paragraph (c)(1)(i), to perform substantial employment functions on behalf of its client employers is generally determined based on the facts and circumstances of the particular situation. This approach gives PEOs maximum flexibility to structure their affairs and recognizes that all PEOs do not necessarily follow the same business model or provide the exact same services to client employers. It also provides PEOs room for innovations in their business models and service packages in the future. At the same time, however, the Department understands that some entities may prefer more regulatory certainty in ordering their business affairs than comes from a facts-and-circumstances test. For this reason, the final rule contains a regulatory safe harbor separate from this facts-and-circumstances test.

The safe harbor is contained in paragraph (c)(2) of the final rule and differs from the safe harbor structure in the Proposed Rule. The Proposed Rule contained two safe harbors, one for CPEOs within the meaning of Code section 7705, and another for PEOs that are not CPEOs (non-CPEOs). The change in structure stems from commenters who raised concerns regarding both the number and type of criteria required under the Proposed Rule. The commenters stated that the Proposed Rule's list of nine criteria for non-CPEOs were, depending on the particular criterion, unnecessary, unrealistic, not entirely consistent with industry practice, not exactly reflective of how PEOs and their clients share employer functions, misaligned with many state licensing requirements, or out of step with the advisory role of PEOs. Without significant adjustments to this safe harbor, including eliminating at least two of the Proposed Rule's nine criteria, the commenters asserted that many non-CPEOs would not qualify for the safe harbor. The commenters recommended adding a criterion that the PEO be licensed and registered in accordance with state law. With respect to the Proposed Rule's CPEO safe harbor, the commenters essentially argued that the Proposed Rule required PEOs to satisfy too many employment-function criteria and that CPEO status alone should be sufficient, assuming the service contract between the client and the CPEO meets the requirements in the Code. One person asked for clarification on what would happen under the safe harbor if a CPEO temporarily lost its certification, and therefore its CPEO status, under the Code for minor infractions, procedural missteps, or reasons having nothing to do with substantive performance of employment functions on behalf of client employers. One commenter argued that the standards should be the same for both CPEOs and non-CPEOs, and not more or less favorable to one business model over the other. This commenter viewed the Proposed Rule as favoring CPEOs.

In response to these comments, the Department streamlined the Proposed Rule's safe harbor structure in the final rule. Unlike the Proposed Rule, which contained one safe harbor for PEOs that are CPEOs and a second safe harbor for PEOs that are non-CPEOs, the final rule contains only one safe harbor for all PEOs regardless of their status under the Code's CPEO provisions. There may be sound business reasons behind a PEO's decision to be a CPEO or not, and there may be equally sound business reasons behind a client employer's decision to choose or not choose a CPEO. Nevertheless, the status of a PEO under the Code's CPEO provisions is irrelevant to satisfying the safe harbor in the final rule; the relevant focus is the extent to which the PEO actually performs substantial employment functions on behalf of its client employers. The Department determined that the complexity of the Proposed Rule's safe harbor could be reduced by reducing and combining the essential elements of the Proposed Rule's two separate safe harbors into a single safe harbor that both CPEOs and non-CPEOs may rely on in connection with ERISA section 3(5). The Department reiterates that this is a safe harbor, intended to provide regulatory certainty. It is possible that a PEO could satisfy the statute's general facts and circumstances test, even if it does not satisfy the safe harbor.

Instead of nine criteria, the new safe harbor contains only four criteria, and instead of allowing the PEO the choice of selecting five from among the nine criteria, the new safe harbor requires that the PEO satisfy all four criteria. The four criteria selected were drawn from the types of services and functions PEOs routinely provide to clients, and with reference to, but not dependent on, the CPEO statutory standards. After carefully reviewing the public comments, the Department selected the four criteria that the commenters indicated are central to all PEO client contracts and that, in the Department's view, clearly show the PEO acts indirectly in the interest of the client-employer under ERISA section 3(5), in such a way and to such an extent that it sets the PEO apart from a mere service provider.

The new safe harbor provides that a PEO will be considered to perform substantial employment functions on behalf of its client employers under the following circumstances: First, the PEO assumes responsibility for and pays wages to employees of its client-employers that adopt the MEP, without regard to the receipt or adequacy of payment from those client employers. Second, the PEO assumes responsibility to pay and perform reporting and withholding for all applicable federal employment taxes for its client employers that adopt the MEP, without regard to the receipt or adequacy of payment from those client employers. Third, the PEO plays a definite and contractually specified role in recruiting, hiring, and firing workers of its client-employers that adopt the MEP, in addition to the client-employer's responsibility for recruiting, hiring, and firing workers. As explained below, a

PEO is considered to satisfy this standard if it recruits, hires, and fires, assumes responsibility for recruiting, hiring, and firing, or retains the right to recruit, hire, and fire workers of its client-employers that adopt the MEP, in addition to the client-employer's responsibility for recruiting, hiring, and firing workers. Fourth, the PEO assumes responsibility for and has substantial control over the functions and activities of any employee benefits which the client contract with a client employer may require the PEO to provide, without regard to the receipt or adequacy of payment from those client employers for such benefits. All four of these criteria must be satisfied to meet the safe harbor.

The Proposed Rule contained language providing that, depending on the facts and circumstances of the particular situation, even one of the safe harbor criteria alone may be sufficient to satisfy the general requirement that a PEO perform substantial employment functions on behalf of its client employers. The final rule does not include that language. The Department's view is that it is not appropriate to state that any single safe harbor criterion alone can be relied upon to satisfy the general requirement that a PEO perform substantial employment functions on behalf of its client employers—all four safe harbor criteria are necessary given the broad scope of activity encompassed by the new safe harbor test and the nature of the four remaining safe harbor criteria.

With respect to the third criteria, the first sentence of paragraph (c)(2)(iii) of the final rule requires that the PEO have a definite and contractually specified role in recruiting, hiring, and firing workers of its client-employers that adopt the MEP, in addition to the client-employer's responsibility for recruiting, hiring, and firing workers. This sentence recognizes that PEOs and their client-employers share responsibilities and can also individually retain responsibilities. For example, a PEO client contract may provide that the client-employer shall recruit, hire, and fire based on the needs of the business, but allocate certain termination responsibilities to the PEO, such as in the event a worksite employee engages in employment discrimination that violates Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, or the Americans with Disabilities Act of 1990. This sentence also recognizes that PEOs commonly have a role, for payroll and other human resource purposes, in hiring and firing workers of client-employers, but client-employers determine who works at their worksites and under what conditions, as necessary to conduct their business.

The second sentence of paragraph (c)(2)(iii) of the final rule goes on to explain that the requirement to have a ''definite and contractually specified role'' in the first sentence would be satisfied if, pursuant to the contract, the PEO recruits, hires, and fires; assumes the responsibility for recruiting, hiring, and firing; or retains the right to recruit, hire, or fire workers of its client-employers that adopt the MEP. This text does not necessarily require that PEOs actually interview and select the employees of client employers in the traditional common-law sense, in which a business hires employee based on the skillset and needs of the particular business, but it does require that PEOs, at a minimum, retain a right or obligation under contract to recruit, hire, and fire as necessary to fulfill the PEO's responsibilities under the contract and applicable state law. For example, a PEO client contract may provide that following the client-employer's initial decision to hire an employee, that hiring decision does not become official until the PEO approves or ratifies the selection and finishes the administrative on-boarding process. Similarly, a PEO client contract may provide that client employer may not terminate a worksite employee until the PEO validates or approves the termination. The intent of paragraph (c)(2)(iii) is to accommodate the broad range of human resource services provided by and across the various PEO models, but at the same time to require a definite and contractually specified role for the PEO in the shared recruiting, hiring, and firing processes.

c. PEOs and Working Owners

As discussed below in section 5 (d) of this preamble, the final rule—like the Proposed Rule—does not extend the working-owner provisions to bona fide PEOs.

d. PEOs and Health Plans

Some stakeholders inquired whether a ''bona fide professional employer organization'' that is authorized under the final rule to sponsor a MEP for the employees of its client employers also would be able to establish and maintain a single plan, fund, or program of healthcare benefits for these same individuals. These stakeholders observed that the definition in section 3(5) of ERISA does not differentiate as to the type of benefit plan that an employer who meets the 3(5) definition may establish or maintain. Consequently, these stakeholders maintain, if a PEO meets the conditions to be an employer for purposes of sponsoring a single pension plan, the PEO also should be able to rely on that status to sponsor a single group health plan. The stakeholders also argued that the same or similar policy reasons that support expanded access to retirement plan options for small employers also support expanded access to healthcare options for these same employers. Section 3(5) of ERISA, in relevant part, provides that the term ''employer'' means any ''person'' acting indirectly in the interests of an employer, in relation to ''an employee benefit plan.'' Although the statute is neutral on its face as to the type of employee benefit plan being established or maintained by the ''person,'' the final rule does not address when a PEO may be able to act as an employer for establishing or maintaining a single group health plan to cover the employees of the PEO's client employers. Evidence suggests that some PEOs already offer health plans to the employees of their client employers and that this number could increase.[34] But, as many commenters noted, health plan sponsorship may raise different issues and require different regulatory conditions than retirement plans.[35] The topic of health plans is beyond the scope of this rulemaking project. The Proposed Rule did not address the topic of health plans in a meaningful way, or provide the opportunity for the public to provide comments. Accordingly, the PEO provisions in the final rule remain limited to defined contribution retirement plans. Until the Department takes additional regulatory or other action, a PEO interested in sponsoring a health arrangement for its client

[34] See ''*2015 Employer Health Benefits Survey,*'' *Section Fourteen: Employer Opinions and Health Plan Practices, Kaiser Family Foundation,* September 2015, available at *https://www.kff.org/report-section/ehbs-2015-section-one-cost-of-health-insurance/.* (Five percent of firms with 3 to 499 workers offering health benefits through a PEO (Exhibit 14.8). Six percent of covered workers enrolled in health benefits at firms with 3 to 499 workers are enrolled in a plan offered through a PEO. The uptake was greatest for firms that had 10–49 workers, with 8% of those firma offering health benefits through a PEO.

[35] As described above, the Department recognizes the importance of expanding access to affordable group health care coverage to small employers and accordingly, published a final rule on Association Health Plans that permits a bona fide group or association of employers to establish a single group health plan for the employer members' employees; and sets out specific requirements that such group or association must meet in order to be a 3(5) employer. 83 FR 28912 (June 21, 2018). One such requirement that is unique in the health plan context is that group health plan must not discriminate against employees in premiums, eligibility or benefits based on a health factor.

employers must look to the terms of the statute.

5. Working Owner Provision

a. In General

Paragraph (d) of the Proposed Rule expressly provided 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. This provision in the Proposed Rule is the same as the working-owner provision in the AHP Rule.[36] Paragraph (d) of the Proposed Rule was limited to MEPs established and maintained by bona fide groups or associations of employers, and did not extend to MEPs established and maintained by PEOs. The public commenters supported this provision, which is adopted as proposed.[37]

b. Hours-Worked Provision

Paragraph (d)(2) of the Proposed Rule included an ''hours worked'' provision that contained three essential requirements. First, the term ''working owner'' means any person who a responsible plan fiduciary reasonably determines is an individual 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. Second, this person also must earn wages or self-employment income from the trade or business for providing personal services to the trade or business. Third, this person must work ''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.''

At least one commenter requested clarification on how to apply the hours-worked provision to workers that do not have a defined work schedule that results in a steady and predictable 20-hour work week or 80-hour month. The precise issue in need of clarification for this commenter is whether plan fiduciaries are permitted to use two-year averages when determining if working owners meet the minimum-hours-worked requirement. According to this commenter, many workers in the construction industry have variable employment, which is dependent on the economy, weather, and other business and market factors. Working owners facing these predicaments may encounter periods of high demand for their services, during which they work greatly in excess of 80 hours per month, followed by periods of sustained low demand, during which they work significantly less than 20 hours per week.

While the Department in this document does not render an opinion on the categorical appropriateness of using two-year averages, the final rule expressly permits the use of averaging by plan fiduciaries to determine whether working owners satisfy the hours-worked provision in the final rule. The Department adopted averaging language in the AHP Rule in order to accommodate these ''variable workers'' in that context, and today imports that same language into this final rule. Thus, this final rule too allows flexibility in making an hours-worked determination to address situations in which a working owner's time performing services for his business varies due to various industry, seasonal, and other business and market factors. A working owner could demonstrate this by evidence of a work history or a reasonable projection of expected self-employment hours worked in a trade or business. While the final rule contains minimum weekly or monthly hours-worked requirements, it does not contain a maximum reference period over which averaging of hours is permitted or required. Since many of ERISA's and the Code's pension benefit provisions require annual recordkeeping and attention, many MEPs may decide to adopt annual or 12-month periods for averaging purposes out of administrative efficiency, although others may not. Ultimately, whether any particular maximum reference period is appropriate, however, is a matter within the discretion of the plan fiduciary taking into account the plan document and facts and circumstances of the particular situation. The exercise of this discretion by the plan is subject to the general fiduciary requirements of section 404(a) of ERISA. Accordingly, the final rule adopts paragraph (d)(2)(iii) of the Proposed Rule without change.

c. Wages or Self-Employment Income

Paragraph (d)(2) of the Proposed Rule included an ''earned income'' alternative to the ''hours worked'' provision. Under the earned-income alternative, the working-owner must have ''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.'' For this purpose, 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.

Several commenters were confused by the earned-income provision. Some thought it was unnecessary in light of the hours-worked provision. These commenters apparently understood the earned-income provision to be a requirement in addition to the hours-worked condition, and not an alternative. Other commenters did not understand the connection between health care premiums or cost of coverage and participation in a MEP. The commenters recommended eliminating this provision because they either thought the provision was a mistake or saw no need for it.

The earned-income provision is an alternative to the hours-worked provision. These two separate provisions are disjunctive conditions, not conjunctive requirements. Thus, working owners may choose whichever test is more appropriate for their circumstances. Further, this provision offers administrative ease and convenience to the administrator of the MEP. This is because the Department expects many groups or associations of employers to offer to their members both AHPs and MEPs and, 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 and an employee for participating in a MEP. In finalizing the AHP Rule, the Department concluded that using the cost of coverage of benefits under the AHP was a meaningful metric to ensure that the working owner has a legitimate trade or business, keeping in mind that ERISA governs benefits provided in the context of a work relationship as opposed to the mere marketing of insurance to

[36] 83 FR at 28964. In *State of New York* v. *United States Department of Labor,* 363 F. Supp. 3d 109 (D.D.C. March 28, 2019), the District Court vacated portions of the Department's final rule on AHPs, including the working-owner provisions at 29 CFR 2510.3–5(e). The Department disagrees with the District Court's ruling and an appeal has been filed.

[37] Nothing in the final rule should be read to indicate that a business that contracts with individuals as independent contractors becomes the employer of the independent contractors merely by participating in the MEP with those independent contractors who participate as working owners, or by promoting participation in a MEP by those independent contractors, as working owners.

individuals unrelated to their status as employees in a trade or business and any benefits they obtain through that status. 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, making reference to the cost of healthcare coverage a proxy in those cases where the group or association has such a plan. For these reasons, the earned-income provision was not eliminated.

Section 401(c) of the Code provides rules for when a self-employed individual may participate in a qualified retirement plan. The Department solicited comments on whether there might be circumstances under which a ''working owner'' as defined in paragraph (d)(2) of the Proposed Rule might nonetheless fail to be described in section 401(c) of the Code, and if so whether the two provisions could and should be directly aligned. Comments were specifically requested on whether the final rule should limit the definition in paragraph (d)(2) to self-employed individuals described in section 401(c) of the Code to avoid such failures. The Department received no comments indicating a need for or in support of such a limitation. One commenter opposed such a change. This commenter was concerned about the complexity associated with making determinations under section 401(c) of the Code and imposing such an obligation on plan fiduciaries of MEPs. In light of this comment, no changes in this regard were made to the final rule. However, the Department of the Treasury has advised that the inclusion of an individual who is not a common law employee or treated as an employee under section 401(c) would affect the qualified status of the plan. Also, they advised that a plan covering an owner-employee is qualified only if it limits contributions with respect to the owner-employee in accordance with section 401(d) of the Code.

d. Extending Working Owner Provision to PEOs

The final rule does not extend the working-owner provision to MEPs sponsored by PEOs under paragraph (c). Thus, a working owner's trade or business must have at least one common law employee to participate in a PEO's MEP under paragraph (c) of the final regulation. The Department understands that working owners without employees generally would not have a 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 business need for a relationship with a PEO. Accordingly, the working-owner provision of the final rule only applies for purposes of participation in MEPs sponsored by a bona fide group or association.

One commenter, however, indicated there may be circumstances in which a working owner without common law employees has a genuine need to be in a PEO's MEP. This occurs 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, according to the commenter. The Department declines to expand the working-owner provision in paragraph (d) for this situation. In this situation, the working owner is still a participant covered under the plan with respect to his individual account balance because he is or may be eligible to receive a benefit, without regard to whether the working-owner continues his contract with the PEO. This status continues until the working-owner-participant is no longer covered by the plan (*e.g.,* receives a lump-sum distribution or a series of distributions of cash or other property which represents the balance of his or her credit under the plan, or a plan-to-plan transfer has occurred).[38] Thus, the working owner in this situation is treated the same as a former employee of a client employer that has an ongoing contract. The clause ''employees and former employees of former client employers who became participants during the contract period between the PEO and former client employers'' was added to paragraph (c)(1)(iv) of the final rule to make this point clear.

6. Miscellaneous Topics

a. ERISA Fiduciary Status and Responsibilities of Sponsor and Participating Employers

The Department received multiple comments on the application of ERISA's fiduciary rules to bona fide groups and associations, PEOs, and participating employers. Several commenters, for instance, asked the Department to provide guidance on fiduciary liabilities and responsibilities of a bona fide group or association or PEO that sponsors a MEP and clarify that any individual charged with the operation or management of a MEP is considered a fiduciary under ERISA. These commenters stressed that it is important for groups and associations and PEOs that sponsor a MEP to understand that they are obligated to protect the interests of the participants of the plan, and may be held individually liable if they fail to do so. Other commenters, by contrast, focused on participating or client employers; these commenters requested clarification of a participating or client employer's duty to prudently select and monitor the MEP in which the employer's employees participate.

A MEP offered by a bona fide group or association, or by a PEO, under the final rule is subject to all of the provisions under title I of ERISA applicable to employee pension benefit plans, including the fiduciary responsibility and prohibited transaction provisions in part 4 of ERISA. Bona fide groups or associations and PEOs that sponsor a MEP assume and retain responsibility for operating and administering the MEP, including ensuring compliance with these requirements.[39] As an operational matter, the MEP's sponsor—and not the participating employers—would generally be designated as the plan administrator responsible for compliance with the requirements of title I of ERISA, including reporting, disclosure, and fiduciary obligations. Under this structure, 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. Although participating employers would retain fiduciary responsibility for choosing and monitoring the arrangement and forwarding required contributions to the MEP, a participating employer could keep more of its day-to-day focus on managing its business, rather than on its plan.[40] In the MEP context, although a participating employer would no longer have the day-to-day responsibilities of plan administration, the business owner would still need to prudently select and monitor the MEP sponsor and get periodic reports on the fiduciaries' management and administration of the MEP, consistent with prior Department guidance on MEPs.[41]

[38] 29 CFR 2510.3–3(d)(2)(ii).

[39] Association Health Plan Final Rule, 83 FR 28912, 28937 (June 21, 2018).

[40] Association Retirement Plans and Other Multiple-Employer Plans Proposed Rule, 83 FR 53534, 53535 (October 23, 2018).

[41] 29 CFR 2509.2015–02, Interpretive Bulletin Relating to State Savings Programs that Sponsor or Facilitate Plans Covered by the Employee Retirement Income Security Act of 1974 (''As a state-sponsored multiple employer plan (''state MEP''), this type of arrangement could also reduce overall administrative costs for participating employers in large part because the Department would consider this arrangement as a single ERISA plan. Under a state MEP, each employer that chose

One commenter suggested that the Department should establish a ''fiduciary checklist'' to assist small employers in discharging their selection and monitoring duties. According to this commenter, the checklist could encourage or require employers to: (1) Consider at least three plans; (2) examine how long the plan has been in existence; (3) review how many other employers and employees are actively enrolled; (4) consider the investment options and all employer and participant fees; and (5) receive and review a report on plan operations and periodically assess employee satisfaction and complaints at least annually. The Department recognizes that small employers often benefit from compliance guides of the type identified by the commenter. To assist business owners in carrying out their responsibilities under ERISA to prudently select and monitor plan service providers generally, the Department's EBSA, several years ago, published a compliance guide entitled ''Tips for Selecting and Monitoring Service Providers for your Employee Benefit Plan.'' The Department's EBSA maintains this document on its website and updates it periodically. The Department agrees with this commenter that small businesses may benefit from a checklist or similar guidance on how to discharge their duties to prudently select and monitor the MEP sponsor. Accordingly, the Department will review and possibly update the Tips document taking into consideration the five factors identified by the commenter.

One commenter requested that the Department clarify that the duties of selection and monitoring are essentially the same for employers that decide to participate in a particular MEP as they are for employers that sponsor their own plans and delegate various plan investment and administrative functions to other plan fiduciaries. Otherwise, according to this commenter, any deviation from the existing framework for allocating fiduciary responsibility in the MEP context may create an incentive for employers with existing plans to transition to a MEP for the sole purpose of limiting their liability. One commenter additionally requested that the Department make it clear that, apart from a duty to select and monitor the operations of the MEP, if the employer selects any investment options, the employer must act and be liable in a fiduciary capacity for this act. Generally speaking, the process of selecting and maintaining service providers will vary depending on the plan and services to be provided. Thus, the commenters' questions are too generic to be answered in a vacuum. Nonetheless, the following principles are clear. The bona fide group or association typically, or the PEO always, is responsible for prudently selecting and monitoring the service providers of the MEP they hire, including any fiduciary service providers. In comparison, the business owner must prudently select and monitor the MEP sponsor and get periodic reports on the fiduciaries' management and administration of the MEP. Finally, the decision to include or delete funds from a plan's investment lineup, or to invest plan assets on the participant's behalf in a particular fund on that lineup, is a fiduciary decision, subject to the fiduciary provisions in Title I of ERISA.

b. Need for Reporting and Disclosure Changes

(i) In General

The Proposed Rule solicited comments on whether any reporting or disclosure requirements are needed to ensure that participating employers, participants, and beneficiaries of MEPs are adequately informed of their rights and responsibilities with respect to MEP coverage and that the public has adequate information regarding the existence and operations of MEPs. Most responsive comments stated either that no new substantive requirements are needed, or that the Department should delay rulemaking on this subject until there is more experience with the types of MEPs described in this final rule.[42] The Department agrees with this position and, therefore, the final rule does not contain modifications to the Department's reporting and disclosure requirements.

Several commenters asked the Department to confirm that the group or association or PEO sponsoring the MEP, and not the participating employers, are generally responsible for the participant disclosures required by part 1 of ERISA. The Department confirms that the administrator of the MEP—and not the participating employers—is responsible for discharging the reporting and disclosure requirements under part 1 of ERISA. In most cases, the group or association sponsoring the MEP, and in all cases the PEO, will be the ERISA 3(16) plan administrator.

(ii) PEOs and Lists of Participating Employers

Several commenters focused on the public's ability to obtain access to a MEP's annual report, including information regarding the identity of individual participating employers or the employer of a single participant. One commenter, for instance, requested that the administrator of a MEP, such as a PEO, be permitted to file the portions of the Form 5500 annual report that relate to participating employers on a confidential or redacted basis. In this commenter's view, PEOs will be less likely to sponsor a MEP (and participants will suffer) if competitors in the PEO marketplace are able to use publicly available information from the Form 5500 for targeted marketing aimed towards the PEO's client employers identified in the annual report.

Conversely, other commenters favored public access to reported information and recommended that the Department make it even easier to locate and retrieve information about specific participating employers. For example, some commenters requested that the Department's website be modified to enable searches based on the name or EIN of a participating employer, rather than the name or EIN of the sponsor. One commenter, representing a state's department of child support services, stated that such agencies frequently need improved search methods to locate assets of non-custodial parents in order to pursue state domestic relations orders. This commenter believed that reporting should be strengthened to permit searches based not only on the name or EIN of the participating employer, but also based on the name of the plan participant.

After reviewing the comments, the Department concluded that the subject matter is outside the scope of this rulemaking project. The Department may address some or all of this topic in a different rulemaking project in the future, or through subregulatory guidance, but does not otherwise address the comments in this final rule.

to participate would not be considered to have established its own ERISA plan, and the state could design its defined contribution MEP so that the participating employers could have limited fiduciary responsibilities (the duty to prudently select the arrangement and to monitor its operation would continue to apply). The continuing involvement by participating employers in the ongoing operation and administration of a 401(k)-type individual account MEP, however, generally could be limited to enrolling employees in the state plan and forwarding voluntary employee and employer contributions to the plan.'').

[42] The Department received several comments regarding electronic disclosures. Although electronic disclosures, like MEPs, were the subject of Executive Order 13847, they are part of a separate rulemaking process. The Department also received a comment regarding recommended disclosure requirements in an ''open MEP'' or ''pooled employer plan'' context. As noted earlier in this preamble, open MEPs are the subject of a separate RFI and are not part of this final rule.

(iii) Fee and Conflict of Information Disclosures

Commenters asked whether each participating employer must receive the disclosures required by section 408(b)(2) of ERISA and the regulations thereunder. ERISA section 408(b)(2) and 29 CFR 2550.408b–2(c) require that certain service providers to pension plans disclose to a ''responsible plan fiduciary'' information about service providers' compensation and potential conflicts of interest. The regulation defines responsible plan fiduciary as ''a fiduciary with authority to cause the covered plan to enter into . . . the contract or arrangement.'' Typically, the responsible plan fiduciary is the plan administrator (within the meaning of section 3(16) of ERISA) or named fiduciary (within the meaning of section 402 of ERISA) of the MEP, and not the participating or client employer. Thus, to the extent participating or client employers in a MEP do not have such authority, the Department is of the view that section 408(b)(2) and the regulations thereunder do not require the disclosure of this information to them. At the same time, however, if the bona fide group or association or PEO itself is a covered service provider (within the meaning of 29 CFR 2550.408b–2(c)) with respect to the MEP, the group or association or PEO must furnish the specified information about its compensation and potential conflicts of interest to the participating or client employer at the time the participating employer or client employer is considering adopting or subscribing to the MEP and thereafter at intervals specified in the regulation. This information must be disclosed because when the participating or client employer adopts the MEP by executing the participation agreement or subscription document, the participating or client employer effectively is acting as a responsible plan fiduciary with respect to the group or association or PEO.

In addition, participating or client employers have a duty under section 404 of ERISA to periodically monitor ongoing management and administration of the MEP to ensure the prudence of continued participation. Carrying out this duty may be aided by the periodic receipt from the administrator or named fiduciary of the MEP of information similar to that described in 29 CFR 2550.408b–2(c), with respect to other of the MEP's service providers.[43] If the administrator or named fiduciary were to refuse to provide such information to a participating employer, either periodically or on request, such failure must be taken into account by the participating employer when deciding whether to continue participating in the MEP and, in and of itself, may justify or require a decision to cease participation.

c. Termination or Severance Situations

Several commenters asked for guidance on severance or termination situations. Specifically, these commenters asked about situations where the participating employer or client employer severs or terminates its relationship with the bona fide group or association or the bona fide PEO, respectively, after having adopted or joined the MEP. The commenters stated that in these situations, while the relationship between the participating employer or client employer and the bona fide group or association or the bona fide PEO is severed, the MEP itself does not necessarily terminate and, consequently, there may be no distributable event on which to authorize distributions of benefits to the employees of the employer. These commenters asked for guidance on whether these benefits may or must remain in the MEP, or whether they may or must be distributed or transferred to another plan, and for clarification of the status of the MEP as a single plan following the severance or termination.

The commenters gave a few examples of likely severance or termination situations. In one example, an employer is a member of a local chamber of commerce, which meets the requirements to be a bona fide group or association, and the employees of this employer participate in the MEP sponsored by the chamber of commerce. The employer terminates its membership with the local chamber of commerce in favor of a statewide chamber of commerce. The employer ceases to have any control over the local chamber of commerce on cancelation of membership, despite the fact that such control is required under paragraph (b)(1)(iv) of the final rule. In another example, a different employer enters into a contract with a PEO that meets the requirements to be a bona fide PEO. This employer had 10 common law employees when it entered the contract with the PEO and enrolled the employees in the MEP sponsored by the PEO. Years later, after a business downturn, the employer must terminate the 10 employees and the only remaining worker is the owner. As a sole proprietor, the business no longer needs the services of the PEO and terminates the contract with the PEO. After termination of the contract, the PEO no longer performs substantial employment functions on behalf of this employer, despite the fact that the performance of substantial employment functions is required under paragraph (c)(1)(i) of the final rule.

Whether the benefits of the employees of a severing or terminating employer may or must remain in the MEP, or whether they may or must be distributed or transferred to another plan should be memorialized in the plan document.[44] Nevertheless, when a participating employer or client employer severs or terminates its relationship with a bona fide group or association or PEO, the severance or termination ordinarily extinguishes the nexus that supports the conclusion that the group or association or PEO is acting as the ''employer'' under section 3(5) of ERISA for purposes of sponsoring a plan for the employees of the participating employer or client employer. In this situation, therefore, the group or association or PEO and the participating employer or client employer will commonly want to implement a spin-off of the assets and liabilities of the employees of the severing or terminating employer, or a plan-to-plan transfer of those assets and liabilities to a separate plan meeting the requirements of the Code, if applicable, as soon as is reasonably practicable.

Importantly, when a participating employer or client employer severs or terminates its relationship with a bona fide group or association or PEO, the severance or termination does not extinguish any fiduciary obligations that the group or association or PEO owes to these participants as the plan administrator and named fiduciary of the MEP; rather, these obligations persist until the participants are no longer covered by the MEP. Pending a

[43] For example, GAO has emphasized the need for small businesses ''to understand plan fees in order to help participants secure adequate retirement savings. *See* 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.*

[44] Information Letter to John N. Erlenborn from Dennis M. Kass, Assistant Secretary, Pension and Welfare Benefits Administration, Department of Labor (March 13, 1986) (''we believe that the decision of whether to establish a successor plan, and if so, the type of such a plan, are clearly business decisions not subject to Title I of ERISA. As in the case of the decision to terminate, the decision to establish a successor plan involves the exercise of wholly voluntary settlor functions. Similarly, decisions about the design and provisions of any successor plan are not subject to Title I.''). Decisions on whether benefits may or must remain in the MEP, or whether they may or must be distributed are subject to applicable Code provisions.

spin-off or transfer, the MEP generally continues to constitute a single plan for purposes of title I of ERISA. But if the arrangement continues to operate in virtually the same manner as before the severance or termination (including the making of contributions by the participating employer or client employer that severs or terminates its relationship) and no party (the group or association, the PEO, or the participating employer or client employer, as applicable) takes action toward a spin-off or transfer within a reasonable timeframe following the severance or termination, the MEP will no longer constitute a single plan for purposes of ERISA. In this situation, the participating employer or client employer (*i.e.,* the entity that severed or terminated its relationship with the group or association or PEO, failed to promptly implement a spin-off or transfer, and nevertheless continued the arrangement in virtually the same manner as before the severance or termination) will be considered to have established and maintained its own separate employee benefit plan. The group or association or PEO will be considered to be acting as a service provider to the plan of the former participating employer or client employer. The MEP—exclusive of the severed employer but inclusive of all remaining non-severed participating employers or client employers—will continue to constitute a single plan for purposes of title I of ERISA.

d. Plan Governance Issues

Commenters suggested that the Department consider the establishment of various new regulatory provisions governing certain aspects of MEP governance and administration. For example, one commenter recommended that the Department establish minimum standards in order for a person to sponsor and administer a MEP, including a minimum number of years of experience in providing retirement benefits, minimum staff qualifications, and minimum capital reserves. The Department believes it has appropriately addressed issues of MEP governance and administration to the extent such issues fall within the scope and subject of this rulemaking, the definition of ''employer'' in section 3(5) of ERISA. The Department, however, will give further consideration to these recommendations in connection with the comments received in response to the RFI on open MEPs and any further rulemaking in this area.

One commenter argued that MEPs should be required to have fair rules that apply to all employers, participants and beneficiaries. That commenter suggested that permitting MEPs to maintain multiple different rules for different employers or classes of employers will increase complexity and costs for all. As indicated, a MEP would be a single plan under title I of ERISA. 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.[45] 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.[46] 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 under sections 404(a)(1)(A) and (B) of ERISA.

One commenter recommended that the final rule govern the number of designated investment alternatives under the MEP. One commenter recommended that the final rule should provide that if an employer fails to pay employee or employer required contributions, the MEP (or the Federal or State licensed investment provider) should be required to freeze the account and notify the employer, employee and the Department. Limiting investment options and remedying delinquent contributions are unrelated to the definition of ''employer'' in section 3(5) of ERISA. Accordingly, the Department considers these recommendations to be beyond the scope of this rulemaking.

Finally, many commenters recommended that the final rule expressly permit MEPs to use electronic media as the default method of furnishing disclosures to participating employers, plan participants, and beneficiaries receiving benefits. Although improving the effectiveness of retirement plan disclosures, including possibly through the broader use of electronic delivery, is the subject of a different section of the MEP Executive Order (E.O. 13847), the Department intends to address this topic as part of a separate rulemaking process.

e. Corporate MEPs

The Proposed Rule solicited comments on whether the final rule should address the status of so-called ''corporate MEPs,'' a term not defined in ERISA. The Proposed Rule considered ''corporate MEPs'' to be defined contribution plans that cover employees of employers related by some level of common ownership, but that are not in the same controlled group or affiliated service group within the meaning of 414(b), (c), and (m) of the Code.

In response, one commenter provided an example of what it described as a very common fact pattern that should be addressed by rulemaking or other guidance. The example involves two companies, A and B, in different industries and different parts of the country, where, as a result of an acquisition, A now owns 60% of B but the remaining 40% of B is owned by unrelated parties. If A and B jointly maintain a retirement plan for the benefit of their employees, the commenter stated that it does not appear that A and B would meet the commonality of interest conditions in the Proposed Rule to qualify as a MEP and, consequently, this ''corporate MEP'' would not be a single plan under the Proposed Rule, but instead would be two plans for purposes of ERISA.

The Department recognizes that meaningful levels of common ownership may serve as an indicator that the members of the ownership group have among themselves a sufficient relationship, unrelated to the provision of benefits, such that one or more of these members can be said to be acting ''indirectly in the interest of'' the others within the meaning of ERISA

[45] 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.

[46] *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.'')

section 3(5) to sponsor a MEP for the group's participation. In DOL Advisory Opinion 89–06A, for example, the Department opined that, a member of a controlled group of corporations that establishes a benefit plan for its employees and the employees of other members of the controlled group, is considered to be an employer within the meaning of ERISA section 3(5), such that only one plan exists for all members of the group.[47]

On the record established thus far, however, the Department lacks a meaningful basis on which to determine the precise level of ownership, below the ownership thresholds of the aggregation rules in sections 414(b) and (c) of the Code, that conclusively distinguishes bona fide ownership groups from commercial enterprises in which members have nominal ownership levels and which exist primarily or solely to market, distribute, underwrite or otherwise provide employee benefits to the nominal owners. The Department, therefore, has decided to explore this topic further in the RFI, published elsewhere in today's **Federal Register**.

f. Interpretive Bulletin 2015–02

This final rule clarifies, through regulation, when 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). Based on its comprehensive review, the Department, therefore, is finalizing this regulation interpreting the term ''employer'' for purposes of ERISA section 3(5). A number of commenters expressed concern regarding the effect the rule, as proposed, could have on other guidance. Commenters specifically indicated that they were concerned with the effect of the proposed rule on State-sponsored MEPs subject to Interpretive Bulletin 2015–02. (29 CFR 2509.2015–02). Nothing in this final rule affects prior guidance regarding how a State may act as an employer in relation to an employee benefit plan. Instead, this final rule provides additional regulatory certainty regarding when a group or association, or a PEO, acts ''indirectly in the interest of an employer'' in relation to a defined contribution multiple employer plan for purposes of ERISA section 3(5). Whether a person acts ''indirectly in the interest of an employer . . . in relation to an employee benefit plan'' for purposes of ERISA section 3(5) depends on the facts and circumstances, including the type of employee benefit plan the entity is acting in relation to, and the type of entity that is acting indirectly in the interest of an employer. Based on its review, the Department believes that this final rule will facilitate the adoption and administration of MEPs and will expand access to workplace retirement plans.

g. Plans Without Employees

The final rule contains an amendment to a different regulation, at 29 CFR 2510.3–3, to support the new working owner provision in paragraph (d) of the final rule. That regulation states the general principle that the term ''employee benefit plan'' shall not include any plan, fund, or program under which no employees are participants covered under the plan. The amendment makes it clear that this general principle does not stand in the way of working owners who want to participate in MEPs. The Proposed Rule sought comments on whether this fix would be sufficient or whether additional or different regulatory amendments should be made to confirm or clarify the long-established exclusion from ERISA of plans covering only individual owners (such as solo 401(k) plans), given the proposal to permit working owners to participate in ERISA-covered MEPs and ARPs. No commenter suggested the Proposed Rule was insufficient. One commenter, however, requested that the Department make it clear that plans without employees continue not to be covered by ERISA. In response to this comment, the Department confirms that the final rule permits 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). Thus, under the final rule, working owners without employees can join an ERISA-covered MEP or they can sponsor a defined contribution plans covering only themselves, which are (and historically have been) outside the coverage of title 1 of ERISA.

h. Coordination With Other Federal Agencies

Several commenters raised issues involving the Code and other federal laws beyond the Department's jurisdiction, and requested that the Department coordinate and work with the relevant agencies to provide guidance to facilitate and promote MEPs. For example, several commenters requested that the Department work and coordinate with the Department of the Treasury and the Internal Revenue Service (IRS) on guidance regarding the circumstances under which a MEP may satisfy the tax-qualification requirements in the Code, 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 as directed by Executive Order 13847. On July 3, 2019, after consultation with the Department of Labor, the Department of the Treasury issued a notice of proposed rulemaking addressing these tax qualification issues in the **Federal Register** (84 FR 31777). Specifically, the proposed regulations would provide an exception, if certain requirements are met, to the application of the ''unified plan rule'' for a defined contribution MEP in the event of a failure by an employer participating in the plan to satisfy a qualification requirement or to provide information needed to determine compliance with a qualification requirement. These proposed regulations would affect MEPs, participants in MEPs (and their beneficiaries), employers participating in MEPs, and MEP plan administrators. The Department of Labor will continue to consult with the Department of the Treasury and the IRS in connection with their development of those regulations.

Other commenters focused on the need for guidance or special rules on the Code's non-discrimination provisions more generally. One commenter requested the Department to coordinate with the IRS to clarify that MEPs are permitted to establish arrangements under section 403(b) of the Code (programs for the purchase of an annuity contract or the establishment of a custodial account). One commenter requested that the Department coordinate and work with the IRS and the Securities and Exchange Commission to remove restrictions on the ability of 403(b) plans to invest in certain investment vehicles. These comments are beyond the scope of this final rule.

i. Severability

Finally, paragraph (e)(1) of the final rule includes a severability provision that provides that if any of the provisions in the final rule are found to be invalid or stayed pending further agency action, the remaining portions of the rule would remain operative and available for qualifying employer groups or associations or PEOs. Paragraph (e)(2) of the final rule illustrates how the Department intends the severability

[47] With respect to a plan maintained by one or more members of a controlled group of corporations (within the meaning of section 1563(a) of the Code, determined without regard to sections 1563(a)(4) and (e)(3)(C)), all employees of such corporations shall be treated as employed by a single employer. 29 U.S.C. 1060(c).

provision to apply in one specific situation. The example illustrates that if a federal court were to find the substantial business purpose test to be legally insufficient, then the substantial-business-purpose safe harbor (viability) becomes the whole of that part of the rule without the need for any further notice-and-comment rulemaking by the Department. Although the example is detailed and specific, the severability provision itself is not limited to the facts of the example. For instance, a ruling by a federal court that the ''working owners'' provision in section 2510.3–55(d) is void will not impact the ability of an employer group or association to meet the ''commonality of interest'' requirement in section 2510.3–55(b)(2) by being located in the same geographic locale. This example has been added to paragraph (e)(2) of the final rule to clarify the Department's intention that the severability provision is one of general applicability and, consequently, applies to the whole of the section and is not limited to any specific provision.

C. Regulatory Impact Analysis

1. Summary

As discussed earlier in the preamble, this final 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. Unfortunately, however, many hardworking Americans, especially those employed by small businesses and those who are self-employed, do not have access to a retirement plan at work. 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 access to such plans among small employers and among individuals who are ''working owners'' without employees, referred to herein as 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 final rule, employer groups and associations can sponsor MEPs tailored to the retirement plan needs of their members at lower costs than currently available options. Thus, the final rule provides 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 should benefit from economies of scale by participating in MEPs, which could reduce their administrative costs and plan fees. Like other large retirement plans, large MEPs created by sponsors meeting the conditions set forth in this rule would enjoy scale discounts and might exercise bargaining power with financial services companies. Large MEPs could 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.[48] 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.[49]

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 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.[50] 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 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 this rule to reduce costs and increase access to workplace retirement plans for many employees of small businesses and the self-employed.

Other potential 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 acceptance of rollovers from other qualified plans, (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 to the Department 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 other defined contribution pension plans. Nor was such information received among the comments responding to the proposal. Furthermore, the Department has compliance assistance and enforcement systems in place to safeguard plan assets from fraud and abuse.

The Department believes that participation in workplace retirement plans will increase because of this rule; however, there is some uncertainty regarding the extent of the increase. 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 final rule affects. If more employers adopt MEPs, it is unclear how many of their employees will choose to enroll and by how much aggregate retirement savings will increase. Nevertheless, given the significant potential for MEPs to expand access to affordable retirement plans, the Department has concluded that this rule will deliver social benefits that justify their costs. The Department's analysis is explained more fully below.

As discussed earlier in the preamble, some commenters argued that to achieve an actual substantial increase in access to retirement plans, the Department must expand the rule to allow (1) ''open MEPs'' or ''pooled employer plans,'' which generally are arrangements that cover employees of employers with no

[48] 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.*

[49] 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.

[50] EBSA Advisory Opinion 2012–04A (May 25, 2012).

relationship other than their joint participation in the MEP, and (2) so-called ''corporate MEPs,'' which are plans that cover employees of related employers that are not in the same controlled group or affiliated service group.[51] Although the Department did not include such arrangements in the final rule, it is simultaneously publishing elsewhere in today's **Federal Register** a related RFI regarding whether commercial service providers and corporate groups, other than employer groups or associations and PEOs, should be able to sponsor MEPs to develop a more robust record and obtain additional data regarding this issue.

2. Executive Orders

Executive Orders 12866[52] and 13563[53] 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 rule is economically significant within the meaning of section 3(f)(1) of the Executive Order. Therefore, OMB has reviewed the rule pursuant to the Executive Order.

The background to the rule is discussed earlier in the preamble. This section assesses the expected economic effects of the 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 to 64 will experience a retirement savings shortfall, meaning resources in retirement will not be sufficient to meet their average retirement expenditures.[54] 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.[55]

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.[56]

Workplace retirement plans often provide a more effective way for employees to save for retirement than saving in their own IRAs. Compared with saving on their own in 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.[57] 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.[58] In contrast, at business establishments with more than 500 workers, 88 percent of workers have access to retirement benefits. Table 1 also shows that many small employers do not offer a retirement plan to their workers.[59]

TABLE 1—RETIREMENT PLAN COVERAGE BY EMPLOYER SIZE

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

[51] In Advisory Opinion 89–06A, the Department stated that it would consider a member of a controlled group of corporations that establishes a benefit plan for its employees and/or the employees of other members of the controlled group to be an employer within the meaning of ERISA section 3(5).

[52] 58 FR 51735 (Oct. 4, 1993).

[53] 76 FR 3821 (Jan. 21, 2011).

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

[55] *Id.*

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

[57] 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).

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

[59] *Id.*

TABLE 1—RETIREMENT PLAN COVERAGE BY EMPLOYER SIZE—Continued

Establishment size: number of workers	Workers		Establishments
	Share with access to a retirement plan %	Share participating in a retirement plan %	Share offering a retirement plan %
All	66	50	48

Source: These statistics apply to private industry. U.S. Bureau of Labor Statistics, National Compensation Survey, Employee Benefits in the United States (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.[60] Employers often also cite annual reporting costs and exposure to potential fiduciary liability as major impediments to plan sponsorship.[61]

Some employers may not offer retirement benefits because they do not perceive such benefits as necessary to recruit and retain good employees.[62] 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.[63] 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.[64]

Many small businesses may have not taken advantage of the existing opportunities to establish workplace retirement savings plans because they lack awareness. As found in a Pew survey, two-thirds of small- and mid-sized 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.[65]

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 awareness among small employers of the retirement savings plan options that exist and the benefits of establishing such plans as a tool for recruiting or retaining qualified workers. MEP sponsors may be particularly effective at raising awareness among small employers that are already members of the group or association or clients of the PEO.

Small businesses typically have fewer administrative efficiencies and less bargaining power than large employers do. The final rule provides 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.[66] Each small employer also would have to obtain a separate fidelity bond satisfying the requirements of ERISA.[67]

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

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

[61] 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*).

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

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

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

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

[66] 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.

[67] 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 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.

nontraditional 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, the Department to 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 of comments received in response to the proposal, and has 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 final rule generally provides this flexibility by making five important changes to the Department's prior subregulatory guidance. First, it clarifies 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 relaxes the requirement that group or association members share a common interest, as long as they operate in a common geographic area. Third, it makes clear that groups or associations whose members operate in the same trade, industry, line of business, or profession could sponsor MEPs, regardless of geographic distribution. Fourth, it clarifies 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 rule. Fifth, it establishes criteria under which ''bona fide'' PEOs may sponsor MEPs covering the employees of their client employers.

These criteria also result in more MEPs being treated consistently under the Code and title I of ERISA, and such consistency removes another barrier inhibiting the broader establishment of MEPs. As discussed earlier in the 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.[68]

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 final regulation facilitates the adoption and administration of MEPs and should 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 final rule will 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

The final rule has the potential to encourage both the creation of new MEPs and the expansion of existing MEPs. As background for estimating the number of entities that would be affected by this rule and its impact, the Department has reviewed the characteristics of existing MEPs that file Forms 5500.[69] Since this rule is limited to defined contribution pension plans, referred to in this document as ''MEPs'' or ''DC MEPs,'' Table 2 presents statistics for DC MEPs only. Currently DC MEPs comprise only a small share of the private sector retirement system, as shown in Table 2.[70] Based on the latest available data, about 4,630 DC MEPs exist with approximately 4.4 million total participants, 3.7 million of whom are active participants. DC MEPs hold about $181 billion in assets.[71]

TABLE 2—CURRENT STATISTICS ON MEPS

	Number of MEPs	Total participants	Active participants	Total assets
MEP DC Plans	4,630	4.4 million	3.7 million	$181 billion.
As a share of all ERISA DC plans	0.7%	4.4%	4.6%	3.2%.
MEP DC Plans	4,630	4.4 million	3.7 million	$181 billion.
401(k) Plans	4,391	4.1 million	3.4 million	$166 billion.
Other DC Plans	239	0.4 million	0.3 million	$15 billion.

Source: EBSA performed these calculations using the 2016 Research File of Form 5500 filings. For these purposes, EBSA classified a plan as a MEP if it indicated ''multiple employer plan'' status on the Form 5500 Part I Line A and if it did not report collective bargaining. The estimates are weighted and rounded, which means they may not sum precisely.

Some DC MEPs are very large; 56 percent of total participants are in MEPs with 10,000 or more participants.[72] Furthermore, 98 percent of total participants are in MEPs with 100 or more participants. There are 40 MEPs holding over $1 billion in assets each.[73] In existing DC MEPs, 89 percent of participants direct all of the

[68] See Internal Revenue Code (IRC) section 413(c)(2) and 26 CFR 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. 26 CFR 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. 26 CFR 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.

[69] ''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).

[70] EBSA performed these calculations using the 2016 Research File of Form 5500 filings. For these purposes, EBSA classified a plan as a MEP if it indicated ''multiple employer plan'' status on the Form 5500 Part I Line A and if it did not report collective bargaining. The estimates are weighted and rounded, which means they may not sum precisely.

[71] *Id.*

[72] *Id.*

[73] *Id.*

investments, another 8 percent direct the investment of a portion of the assets, and the remainder did not direct the investment of any of the assets.[74]

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 final rule, would have been 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.[75]

As stated earlier in the preamble, PEOs generally are entities that enter into agreements with client employers to perform 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.[76] The final rule would allow certain PEOs meeting the requirements of paragraph (c) to sponsor MEPs and offer coverage to their client employers' employees.

This final rule should 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 without paid employees. Although there are other retirement savings vehicles available to these self-employed workers, they 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.[77] The final rule is expected to provide many of these self-employed workers without employees 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 rule will become eligible to join MEPs.[78] These workers are involved in a wide range of occupations: lawyers, doctors, real estate agents, childcare providers, as well as 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] Similarly, some provide on-demand services part-time, or as a second or third job.[80]

On-demand 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.[81] Relatively few of those workers have access to employer-sponsored retirement plans, one survey found.[82] According to another survey, many traditional workers who pursue on-demand 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 on-demand work is their main job have less than $1,000 set aside for retirement.[83] MEPs should help raise awareness and ease entry to retirement coverage for broad classes of these workers, such as on-demand drivers.

Electronically mediated workers obtain short jobs or tasks through websites or mobile apps that both connect them with customers and facilitate payment for the tasks. In May 2017, there were approximately 1.6 million electronically mediated workers (1 percent of total employment) including all who performed electronically mediated work for their main job, a second job, or for additional work for pay.[84] Compared to the overall workforce, electronically mediated workers are more likely to work part-time, more likely to have a bachelor's degree or higher, and more likely to be self-employed, particularly unincorporated self-employed.[85] Independent contractors were more likely to perform electronically mediated work (6 percent) than workers in traditional employer–employee arrangements (less than 1 percent) in 2017.

Policymakers have expressed concern about how many workers providing on-demand services, and self-employed workers more generally, do not have access to retirement plans and appear to be ill-prepared for retirement. By allowing self-employed individuals who meet the requirements of the final rule to participate in MEPs, the rule will increase their access to retirement plans.

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

[74] *Id.*

[75] 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.

[76] 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.*

[77] 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 are mostly unincorporated.

[78] DOL tabulations of the February 2019 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] ''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.*

[81] 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 working on demand is ''running your own HR department and you're the benefits manager, which means taking sole responsibility for your retirement.''

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

[83] ''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 on-demand workers are paying off debt.

[84] ''Electronically mediated work: New questions in the Contingent Worker Supplement'' Monthly Labor Review, September 2018, Bureau of Labor Statistics.

[85] *Id.*

such plans for employees of small businesses is relatively low. The final rule's expansion of access to certain MEPs enables 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 should occur, especially among small employers.

The MEP structure addresses significant concerns from employers about the costs of setting up and administering retirement benefit plans. In order to participate in a MEP, employers generally are required to execute a participation agreement or similar instrument setting forth the rights and obligations of the MEP and participating employers. These employers will then participate in a single plan, rather than sponsoring a separate ERISA-covered plan. Therefore the employer group or association or PEO will act as the ''employer'' sponsoring the MEP within the meaning of section 3(5) of ERISA. That employer group or association or PEO typically will 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 should 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. Moreover, there is potential that more of the fiduciary responsibility will reside where it will be discharged more efficiently by qualified professionals with more skill than otherwise would be expected, which could ultimately lead to greater protection for plan participants and beneficiaries. MEPs as large plans will generally be likely to work with service providers with a high level of specialized expertise. 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 [86] and the Small Business Job Protection Act of 1996 [87] 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) [88] included provisions 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 final rule will increase access to workplace retirement plans when other initiatives have had limited effect. Several factors indicate to the Department that they should.

First, the Department believes that employers may be more likely to participate in a MEP sponsored by a PEO, or a group or association of employers, with whom they have a pre-existing relationship based on trust and familiarity. For example, a PEO that performs payroll or human resources 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 healthcare premiums from participating employers,[89] 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.[90] 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.

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 due to the final rule. Nor did the comments submitted in response to the proposed rule offer data on this topic. However, overall, the Department believes that the rule will provide a new valuable option for small employers and the self-employed to adopt retirement savings plans for their employees, which should 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 the Department expects that MEPs will pass some of the attendant savings onto participating

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

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

[88] Public Law 107–16, 115 Stat. 38.

[89] 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 rule, 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.

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

employers and participants.[91] 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. More often, however, the legal status of MEPs as a single large plan will 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.

As a result of these two types of scale efficiencies, MEPs operating as a large single plan likely will secure substantially lower prices from financial services companies than such firms would charge separate small employer plans. 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.[92] These lower 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 likely will 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 substantial large-scale efficiencies. Investors of all kinds generally benefit by investing in large comingled 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 invited but did not receive comments in response to the proposal regarding 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 should 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 groups or associations of employers that perform other functions for their members in addition to offering retirement benefits (such as chambers of commerce or trade associations) and PEOs have the potential to realize administrative savings. These existing organizations may already have extensive memberships and relationships with small employers; thus, they may have low marginal costs for recruitment, setup, marketing, and administration. These organizations may have been 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 final rule, however, they can 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. The scale efficiencies of MEPs, however, will still likely be smaller than the scale efficiencies enjoyed by very large single-employer plans. The Department invited but did not receive comments in response to the proposal 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.

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

[92] 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-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).

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 rule will allow more MEPs to be established and to claim a significant market presence and thereby pursue scale advantages. Consequently, this rule should 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 rule would have offered separate plans (or no plans) but that under this final rule 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.[93] 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 these data show 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
$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, generally, plans with fewer than 100 participants generally are not required to submit audited financial statements because they file a Form 5500–SF. The second is that there is variation across plans in whether and to what extent recordkeeping costs are 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 will offer.

An alternative method of comparing potential size advantages is a broader measure called ''total plan cost'' calculated by BrightScope.[94] 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.[95]

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

[93] 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).

[94] *Id.*

[95] *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.

TABLE 4—LARGER PLANS TEND TO HAVE LOWER FEES OVERALL—Continued

Plan assets	Total plan cost (in basis points)		
	10th percentile	Median	90th percentile
$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 conducted a survey of 361 defined contribution plans for the Investment Company Institute. The study calculates an ''all-in'' fee that is comparable across plans including both administrative and investment fees paid by the plan and the participant. Generally, small plans with 10 participants are paying approximately 50 basis points more than plans with 1,000 participants.[96] 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 will give many small employers the opportunity to join a MEP, some of which are very large plans, many of these employers will 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 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 it is shaped not only by economic forces but also by the reporting requirements applicable to different plans. On the one hand, a MEP that is a large, 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 that is 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. Therefore with respect to reporting and audits, MEPs generally can offer substantial savings to employers that would otherwise be subject to stringent reporting and audit requirements in their own plan and modest savings to small employers that would not be subject to such requirements. In fact, under some circumstances small employers might actually incur slightly higher reporting and audit costs by joining a MEP. This cost increase may still be offset by benefits described in other sections. From a broader point of view, if auditing becomes more prevalent because small employers join MEPs, that would lead to more and better quality data that would improve security for employers, participants and beneficiaries.

Sponsors of ERISA-covered retirement plans generally must file a Form 5500 annually, including all required schedules and attachments. The cost burden incurred to satisfy the Form 5500 related reporting requirements varies by plan type, size, and complexity. Analyzing the 2016 Form 5500 filings, the Department estimates that the average cost to file the Form 5500 is as follows: $276 Per filer for small (generally fewer than 100 plan participants) single-employer DC plans eligible for Form 5500–SF, $435 per filer for small single-employer DC plans *not* eligible to file Form 5500–SF, and $1,686 per filer for large (generally 100 participants or more) single-employer DC plans.

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.[97] Hiring an auditor and obtaining an audit report can be costly for plans, and audit fees may increase as plans get larger or more complex. A recent report states that the fee to audit a 401(k) plan ranges between $6,500 and $13,000.[98] One comment letter responding to the proposal reported that their audit cost $24,000.[99] Incorporating the comment, the Department adjusted the estimated audit cost range.[100] The Department uses the intermediate value of $13,000 as the estimated audit cost in order to calculate cost savings estimates.

If an employer joins a MEP, it can save some costs associated with filing Form 5500 and fulfilling audit requirements because a MEP is a single plan. Thus, one Form 5500 and audit report will satisfy the reporting requirements. This means 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 of the association MEPs that they interviewed had 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 equally 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, on average, more participating employers than associations, an employer might save slightly more by joining a PEO MEP compared to joining

[96] 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).

[97] 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.

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

[99] See comment letter #6 Employers Association of New Jersey, EANJ.

[100] In estimating the range of the audit cost, $6,500 is assumed to be a lower end, $24,000 is assumed to be a higher end, and $13,000 is assumed to be a good intermediate estimate.

[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.*

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 $14,539 per year for a large plan joining an association MEP and $14,649 per year for a large plan joining a PEO MEP.[104]

The extent to which small plans experience costs savings from joining a MEP may not be as large as discussed above.[105] This is because small plans eligible for Form 5500–SF bear relatively less burden and generally are not required to conduct audits. By joining a MEP, however, those small plans would share the MEP's cost of audits and more complicated Form 5500 filings. For lower audit costs or for small plans not eligible to file Form 5500–SF, joining a MEP could yield higher savings.

Similarly, it is less clear whether the self-employed will experience large 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. 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.[106] Solo 401(k) plans are also available for self-employed persons, and they may be exempt from Form 5500–EZ reporting requirement if the plans assets are less than $250,000.[107] Thus, if self-employed individuals join a MEP, they will be unlikely to realize reporting costs savings. In fact, it is possible that their reporting costs will slightly increase, because the self-employed would share reporting costs with other MEP participating employers that they otherwise would not incur.

Compared to the alternative of sponsoring single-employer plans, joining a MEP may not save small employers and the self-employed as much as larger employers. Reporting and audit costs, however, are only a part of the costs associated with providing retirement plans. As discussed in other sections, MEPs provides participating employers with other benefits and cost savings. Employers will decide whether to join MEPs based on a broad array of factors.

The Department's estimated reporting and audit cost savings is based on the assumption that all participating employers share costs equally regardless of their size. Thus, these estimated cost savings imply how much, on average, participating employers would save in reporting and audit costs. If a MEP adopts a fee arrangement where costs are distributed among participating employers according to their size, smaller employers could experience higher reporting cost savings than those estimated above. One commenter supported a tiered pricing arrangement over a level fee arrangement, making the assertion that tiered pricing leads to a more equitable distribution among participating employers.[108]

d. Reduced Bonding Costs

The potential for bonding cost savings in MEPs merits separate attention. As noted above, ERISA section 412 and related regulations [109] 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, 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.[110]

Under the final rule, MEPs generally should 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 final rule should lead in aggregate to increased retirement savings. As discussed above, many workers likely will 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.[111]

[103] In terms of cost savings associated with Form 5500 filings without accounting for audit costs, cost savings for small single-employer DC plans filing Form 5500–SF would be $259.50 per filer if it joins an association-sponsored MEP or $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 $417.76 per filer if it joins an association-sponsored MEP as opposed to $430.40 per filer if it joins a PEO-sponsored MEP; for large single employer DC plans cost savings would be $1,668.91 per filer if it joins an association-sponsored MEP as opposed to $1,681.55 per filer if it joins a PEO-sponsored MEP.

[104] These are estimated using an estimated audit cost of $13,000. If the lower end of the audit cost, $6,500 is assumed, then the estimated annual cost savings are $8,104 per filer (for an association MEP) or $8,165 per filer (for a PEO MEP). If the information provided by the commenter, $24,000, is assumed as the audit cost, then the estimated annual cost savings significantly increase to $25,429 per filer (for an association MEP) or $25,622 per filer (for a PEO MEP).

[105] For example, assuming audit costs of $13,000, then a small plan eligible for Form 5500–SF would save $130 by joining an association MEP or $240 by joining a PEO MEP. If the lower-end audit cost of $6,500 is assumed, a small plan eligible for Form 5500–SF would save $195 by joining an association MEP or $256 by joining a PEO MEP. If the higher-end audit costs, $24,000 is assumed, a small plan eligible for Form 5500–SF would save $20 by joining an association MEP or $212 by joining a PEO MEP. In general, a small plan not eligible to file Form 5500–SF would experience higher cost savings than a small plan eligible to file Form 5500–SF.

[106] 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.*

[107] 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.

[108] See comment letter #47 Slavic 401K.

[109] 29 CFR 2550.412–1 and 29 CFR part 2580.

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

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

Among workers whose salary tends to be in the lowest 10 percent of the salary range, this figure is about 40 percent.[112] 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 2017 about 74 percent of plans with 1,000–4,999 participants use automatic enrollment, while only about 27 percent of plans with 1–49 participants do.[113] MEPs often allow participating employers to decide whether they want to use automatic enrollment and to select their other plan design features. It is unclear, however, whether employers participating in MEPs formed under this final rule will be more likely than employers sponsoring single-employer DC plans to use automatic enrollment.

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 might begin receiving employer contributions.

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 seen more often among small plan sponsors that do not want to confront the administrative burden and complexity associated with processing rollovers.[114] While some MEPs may allow participating employers to choose whether to accept rollovers from other qualified plans, it is likely that more participating employers will be willing to do so since the MEP sponsor will handle the administration. It is also possible that some MEPs will be designed such that all participating employers accept rollovers. Moreover, MEPs could facilitate increased portability for employees that leave employment to work for another employer that adopted the same MEP.[115] 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 those provided by large employers. 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.[116]

h. Improved Data Collection

This final rule also has the potential to improve the Department's data collection for purposes of ERISA enforcement. As noted above, the expansion of MEPs is likely to lead some employers who currently file their own Forms 5500 [117] as participating employers in a MEP to belong to a MEP that files a single Form 5500. Since MEPs are usually large plans, they likely will have a much more detailed filing with the associated schedules including an audit report. This filing will tend to contain higher quality, more accurate data than the Department currently receives when a collection of participating employers files as single-employer plans. That is because (1) the required filing for plans with more than 100 participants requires more detail and (2) participating employers will be included in an audit when they were not previously. The same situation occurs when a small employer who is currently sponsoring a single-employer plan joins a large MEP in the future. When auditing becomes more prevalent, the increased oversight should help to prevent fraud and abuse. On the whole, the final rule will lead to more robust data collection for the Department to use in conducting its research, oversight, and enforcement responsibilities under ERISA.

The Department also believes that this final rule will substantially improve the quality of information the Department collects. For example, the Department has encountered instances of participating employers in a MEP filing separate Forms 5500 that fail to account properly for each employer's financial and demographic information on a granular enough level to accurately report its proportion of the whole MEP. The Department has at times received 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 the participating employers in some MEPs.

6. Costs

The final rule does 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.[118] Less

[112] *Id.*

[113] Plan Sponsor Council of America, ''61st Annual Survey of Profit Sharing and 401(k) Plans, Reflecting 2017 Plan Experience'' (2018), Table 111.

[114] A survey of plan sponsors indicates that in 2017, about 86 percent of 401(k) plans with 1–49 participants accepted rollovers from other plans. Among larger plans, the figure is higher; for example, approximately 97 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. *Id.,* Table 37.

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

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

[117] Although the participating employers are filing their own Forms 5500 (or Forms 5500–SF), the MEP 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.

[118] 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*).

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 charging excessive fees or mishandling plan assets.[119] 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 more participants and their assets could be 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 single-employer plans. The Department is not aware of any direct information indicating whether the risk for fraud and abuse is greater for MEPs than other plans, nor did it receive information on this topic in the comments submitted in response to the proposal. Many small employers have relationships based on trust with trade associations that the Department expects to sponsor MEPs under the final rule, and those associations have an interest in maintaining these trust relationships by ensuring that fraud does not occur in MEPs they sponsor. Nevertheless, employers exercise a fiduciary duty in choosing to begin and continue participating in a MEP and should exercise appropriate care, prudence, and loyalty to 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 final rule's PEO provisions. As stated earlier in the preamble, the final rule requires PEOs 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 ERISA), the plan administrator (within the meaning of section 3(16)(A) of ERISA), and a named fiduciary (within the meaning of section 402 of ERISA). Requiring PEOs to act as MEP fiduciaries mitigates fraud concerns related to the expansion of PEO-sponsored plans, because the final rule ensures that PEOs will assume ERISA fiduciary status and bear all associated responsibilities.

7. Transfers

Several transfers are possible as a result of this final 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 rule could also result in asset transfers if MEPs invest in different types of assets than small plans. 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 generally gives tax advantages to certain retirement savings over most other forms of savings.[120] Consequently, all else being equal, a worker who is saving money in tax qualified retirement savings vehicles 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 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. If access to retirement plans and savings increase as a result of this final 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 rule on the federal budget are uncertain. Because the rule increases access to retirement plans, retirement savings likely also will increase. Given the tax deferral associated with retirement savings, tax revenues would likely decrease in the short run. The vast majority of dollars being contributed to defined contribution plans are pre-tax rather than Roth contributions. Pre-tax contributions include approximately 95 percent of participant contributions[121] and all employer contributions. To the degree that Roth contributions may become more common in the future, there would be less short-term reduction in federal revenue.

If people begin saving more for retirement, it is unclear if that would be accompanied by people consuming less, taking on more debt, saving less in nonretirement accounts, or saving less for retirement during future working years. Consequently, the long run net changes in consumption and investment, and the effect on the federal budget, are uncertain.

9. Uncertainty

As discussed above, the Department expects this rule to 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 will increase under this final 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.[122] This

[119] *Id.*

[120] 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 those amounts 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.

[121] This estimate refers to 2014, the most recent year available. IRS, Statistics of Income Division, Form W–2 study, February 2018, Table 7.A.

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

order holds true for small employers, as well.[123] Another survey of employers confirms that small employers offer health insurance more often than retirement plans.[124] That study also suggests that company earnings and the number of employees affect the decision of 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.[125] The top reason provided for employers to start offering a retirement plan is an increase in business profits.[126] Similarly, in another survey, employers not offering retirement plans cited ''the company is not big enough'' most frequently as the reason.[127] Although this rule will 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 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 2019[128]).

SEPs are completely employer funded and they cannot accept employee contributions.[129] 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 IRA (referred to as a 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 $56,000 in 2019.[130]

Participants can withdraw funds from their SEP–IRA at any time subject to federal income taxes. A 10 percent additional tax may apply if the employee 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 circumstances 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 (referred to as a SIMPLE 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 2019, employees are allowed to make salary deferral contributions up to the lesser of 100 percent of compensation or $13,000.[131] Employees 50 or older may also make additional (''catch-up'') contributions of up to $3,000.[132] The employer also must generally make a matching contribution dollar-for-dollar for employee contributions up to three percent of compensation (or a nonelective contribution set at two percent of compensation up to no more than $280,000 of compensation in 2019).[133]

Participants can withdraw funds from their SIMPLE IRAs 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 IRA plans 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 Roth IRAs and the portion of a distribution that constitutes the distribution of after-tax contributions from nondeductible IRAs). A 10 percent additional tax may apply if the employee is under age 59½.

Employees' contributions are limited to $6,000 for 2019.[134] Additional ''catch-up'' contributions of $1,000 per year are permitted for employees age 50 or over.[135] 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.[136]

Solo 401(k): Self-employed individuals with no employees other than themselves and their spouses may establish a 401(k) plan, colloquially referred to as a solo 401(k). As an

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

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

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

[126] *Id.*

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

[128] IRS Notice 2018–83, 2018–47 I.R.B. 774 (11/19/2018).

[129] 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.

[130] IRS Notice 2018–83, 2018–47 I.R.B. 774 (11/19/2018).

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *IRC section 219(b)(5)(B).*

[136] 29 CFR 2510.3–2(d).

employee, a self-employed individual may make salary deferrals up to the lesser of 100 percent of compensation or $19,000 in 2019.[137] They also can make nonelective contributions up to 25 percent 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 $56,000[138] (for 2019). In addition, those aged 50 or older can make additional (''catch-up'') contributions of up to $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. A 10 percent additional tax may apply 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.[139]

Saver's Credit: A nonrefundable tax credit for certain low- and moderate-income individuals, including self-employed individuals, who contribute to their plans is also available. The 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 annual contribution eligible for the credit is $2,000 ($4,000 if married filing jointly).[140]

Discussion: 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.[141] Despite these currently available options for self-employed workers, about 94 percent of self-employed workers did not participate in retirement plans in 2013.[142] Although these low levels of take-up with these other options create some uncertainty that this rule will persuade many self-employed individuals to join a MEP, this uncertainty alone is no basis to ignore MEPs' potential to improve the retirement preparedness of 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 administrative 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. It is possible that, similar to existing options, MEPs will only be modestly attractive to small employers, resulting in only a small increase in 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.[143] Given that multiple low-cost options already exist for small employers, the Department is uncertain to what degree small employers and their workers would benefit from also having the option to join various MEPs, but it expects that the increased availability of plans will provide these employers and their workers with greater access to retirement plans.

Although this rule would ease the burden on 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 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,[144] characteristics that at least one survey suggests reduce the lack of demand for retirement benefits.[145] Indeed, one study found that large employers not sponsoring retirement plans tend 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.

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.

In summary, there are many challenges and inherent uncertainties associated with efforts to expand the coverage of retirement plans, but this final 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 final rule should lower costs and encourage employers, particularly small employers, to establish a retirement savings plan for their workers.

10. Regulatory Alternatives

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

Covering Other Types of MEPS: Executive Order 13847 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. Consistent with the Executive Order, the Department specifically solicited public comments

[137] IRC section 402(g). IRS Notice 2018–83, 2018–47 I.R.B. 774 (11/19/2018).

[138] IRC section 415(c). IRS Notice 2018–83, 2018–47 I.R.B. 774 (11/19/2018).

[139] IRC section 45E(b).

[140] IRC section 25B.

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

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

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

[144] 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*).

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

at the proposed rule stage regarding whether, and under what circumstances, it should address so-called ''open MEPs'' or ''pooled employer plans.'' These arrangements cover employees of employers with no relationship other than their joint participation in the MEP. The solicitation asked commenters who believe these arrangements should be addressed in this or a future rulemaking to include a discussion of why they should be treated as one employee benefit plan with the meaning of title I of ERISA rather than a collection of separate employer plans being serviced by a commercial enterprise that provides retirement plan products and services.

As discussed earlier in the preamble, more than half of the comments received on the proposed rule addressed this issue, and the vast majority supported a rule that would facilitate these arrangements. After reviewing the comments, the Department is persuaded that open MEPs deserve further consideration. The Department received a variety of different ideas and comments, some of which were contradictory. Given the wide range of possibilities, the Department does not believe it has developed a sufficient public record, or obtained sufficient data, to understand thoroughly the complete range of issues presented by these arrangements. Therefore, the Department has published a RFI elsewhere in today's **Federal Register** to develop a more robust public record and to obtain sufficient data to support a future rulemaking.

The Department also solicited comments on whether the final rule should address the MEP status of so-called ''corporate MEPs,'' which are plans that cover employees of related employers that are not in the same controlled group or affiliated service group within the meaning of 414(b), (c), and (m) of the Code.[146] While using the commonality of interest provisions in this final rule to determine bona fide group or association status may not be the appropriate path for corporate MEPs, the Department recognizes that meaningful levels of common ownership may serve as an indicator of genuine economic or representational interests unrelated to the provision of benefits among the ownership group, such that one or more of the group members is acting ''indirectly in the interest of'' the others within the meaning of ERISA section 3(5) in sponsoring a MEP for the group's participation.

On the record established thus far, however, the Department lacks a meaningful basis on which to determine the precise level of ownership that conclusively distinguishes these bona fide ownership groups from commercial enterprises in which members have nominal ownership levels that exist primarily or solely to market, distribute, or otherwise provide employee benefits to members. The Department, therefore, also has decided to explore the corporate MEP topic in the RFI.

PEO Safe Harbor: The proposed rule contained two regulatory safe harbors for PEOs to determine whether they will be considered as performing substantial employment functions on behalf of their client-employers. The first safe harbor provides that a PEO will satisfy the requirement if, among other things, it is a Certified PEO (CPEO) under the Code 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 response to the proposed safe harbor, a commenter argued that the safe harbor standards should be the same for CPEOs and non-CPEOs and not more or less favorable for one business model rather than another. The commenter expressed concern that non-CPEOs would be unable to meet the ''substantial employer functions'' criteria in the proposed rule, and thus, unable to avail themselves of the non-CPEO safe harbor. The commenter viewed the proposal as favoring CPEOs and asserted that the Department should adopt a safe harbor that works for the entire PEO industry.

As discussed earlier in the preamble, in response to the comment, the Department streamlined the safe harbor in the final rule by providing only one safe harbor that applies to CPEOs and non-CPEOs. The Department determined that the complexity inherent in the proposal's safe harbor could be reduced by combining the essential elements of the two safe harbors into a single safe harbor that both CPEOs and non-CPEOs can rely on. The Department believes these changes will allow both CPEOs and non-CPEOs to meet the requirements of the safe harbor and provide optimum choices for employers that are considering joining MEPs sponsored by PEOs.

Working Owner Definition: The final rule's definition of a working owner requires a person to 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 on the hours worked threshold. However, the Department chose the formulation in this final rule (*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. Additionally, based on its expectation that certain groups and associations may offer both AHPs and MEPs, the Department chose this formulation because it parallels the working owner definition from the AHP Rule.

11. Paperwork Reduction Act

The final 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 final rule 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 a final regulatory flexibility analysis (FRFA) of the final rule. The Department has determined that this final 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 FRFA of the final rule below.

a. Need for and Objectives of the Rule

As discussed earlier in the preamble, the 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 final rule are presented with an efficient

[146] In Advisory Opinion 89–06A, the Department stated that it would consider a member of a controlled group that establishes a benefit plan for its employees and/or the employees of other members of the controlled group to be an employer within the meaning of ERISA section 3(5).

option to reduce the costs and complexity associated with establishing and maintaining defined contribution plans. This could encourage more plan formation and broader availability of affordable workplace retirement savings plans, especially among small employers and certain working owners. Thus, the Department intends and expects that the rule will 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 firms with 1–499 employees plus nonemployer firms comprise 99.9 percent of U.S. businesses.[147] The rule applies to firms of all sizes. Small businesses, including sole proprietors, can join MEPs as long as they are eligible to do so and as long as the MEP sponsor meets the requirements of the rule. The Department believes that the smallest firms, those with less than 100 employees, are most likely to be attracted to the reduced costs and fiduciary responsibilities that are associated with offering retirement benefits through a MEP. The Department also believes that many self-employed workers will find MEPs attractive. 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 will become eligible to join MEPs under the rule.[148]

c. Impact of the Rule

As stated above, by expanding MEPs, this final rule will 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 to meet their business and employment needs.

There are no new recordkeeping or reporting requirements for compliance with the rule. In fact, the recordkeeping and reporting requirements would likely decrease for most small employers under the rule. For example, if an employer joins a MEP meeting the requirements of the rule, 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 satisfies the reporting requirements. Accordingly, 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, 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, in developing its formulation of the PEO Safe Harbor. The ''Regulatory Alternatives'' section of the RIA above discusses these significant regulatory alternatives in more detail.

d. Duplicate, Overlapping, or Relevant Federal Rules

The final rule would not conflict with any relevant federal rules. As discussed above, the rule will 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 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 IRS Rev. Proc. 2002–21.

13. Congressional Review Act

The final 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 will be transmitted to Congress and the Comptroller General for review. The 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 final rule does not include any federal mandate that the Department expects will result in such expenditures by State, local, or tribal governments, or the private sector. This is because the rule 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, the final rule does not have federalism implications because it does 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.

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 final rule is an E.O. 13771 deregulatory action, because it

[147] 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.* Last accessed on 10/03/2018. The SBA reports that there are 5,881,267 business with 1–499 employees. Many of these firms will have the option to join a MEP under this rule.

[148] DOL tabulations of the February 2019 Current Population Survey basic monthly data.

provides critical guidance that expands small businesses' access to high quality retirement plans at lower costs than otherwise are 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 is amending 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).

■ 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. Section 2510.3–5 is amended by revising the section heading to read as follows:

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

* * * * *

■ 4. Section 2510.3–55 is added 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 a pension recordkeeper or third-party administrator), 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 PEO performs substantial employment functions on behalf of its client employers that adopt the MEP, and maintains adequate records relating to such functions;

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

(iii) The PEO 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 MEP; and

(iv) The PEO ensures that participation in the MEP is available only to employees and former employees of the PEO and client employers, employees and former employees of former client employers who became participants during the contract period between the PEO and former client employers, and their beneficiaries.

(2) *Safe harbor criteria for substantial employment functions.* For purposes of paragraph (c)(1)(i) of this section, whether a PEO performs substantial employment functions on behalf of its client employers is determined on the basis of the facts and circumstances of the particular situation. As a safe harbor, a PEO shall be considered to perform substantial employment functions on behalf of its client-employers that adopt the MEP if it meets the following criteria with respect to each client-employer employee that participates in the MEP—

(i) The PEO assumes responsibility for and pays wages to employees of its client-employers that adopt the MEP, without regard to the receipt or adequacy of payment from those client employers;

(ii) The PEO assumes responsibility for and reports, withholds, and pays any applicable federal employment taxes for its client employers that adopt the MEP, without regard to the receipt or adequacy of payment from those client employers;

(iii) The PEO plays a definite and contractually specified role in recruiting, hiring, and firing workers of its client-employers that adopt the MEP, in addition to the client-employer's responsibility for recruiting, hiring, and firing workers. A PEO is considered to satisfy this standard if it recruits, hires, and fires, assumes responsibility for recruiting, hiring, and firing, or retains the right to recruit, hire, and fire workers of its client-employers that adopt the MEP, in addition to the client-employer's responsibility for recruiting, hiring, and firing workers; and

(iv) The PEO assumes responsibility for and has substantial control over the functions and activities of any employee benefits which the service contract may require the PEO to provide, without regard to the receipt or adequacy of payment from those client employers for such benefits.

(d) *Dual treatment of working owners as employers and employees.* (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.

(e) *Severability.* (1) If any provision of this section is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding shall be one of complete invalidity or unenforceability, in which event the provision shall be severable from this section and shall not affect the remainder thereof.

(2) *Examples.* (i) If any portion of paragraph (b)(1)(i) of this section (containing the substantial business purpose requirement) is found to be void in a manner contemplated by paragraph (e)(1) of this section, then the whole of paragraph (b)(1)(i) of this section shall be construed as follows: ''The group or association must be a viable entity in the absence of offering and providing MEP coverage or other employee benefits to its employer members and their employees.''

(ii) If any portion of paragraph (d) of this section (containing the ''working owner'' provision) is found to be void in a manner contemplated by paragraph (e)(1) of this section, such a decision does not impact the ability of a bona fide group or association to meet the ''commonality of interest'' requirement in paragraph (b)(2) of this section by being located in the same geographic locale.

Signed at Washington, DC, on July 22, 2019.

Preston Rutledge,

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

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