FEATURE

The History and Future of MEPs and PEPs

Are we headed for a second 'gold rush' for multiple employer plans and pooled employer plans?

BY PETE SWISHER

Legislation favorable to multiple employer plans (MEPs) is broadly expected to pass one of these days, and the pooled employer plan (PEP) variant is one of the likely candidates. This article explores the status of PEP and MEP legislation and what it might actually mean.

First, however, let's look at the history of MEPs — the "why" that led to today.

Congress has a love affair with MEPs, as a number of industry leaders have observed. The evidence of this is unambiguous — more than a dozen MEP-favorable bills in the past six years, zero unfavorable bills, and bipartisan support across the board. And in September 2016, the Senate Finance Committee did something nearly unprecedented — it passed a pension bill (with a PEP provision) out of the committee on a vote of 26-0, showing unanimous support from both Republicans and Democrats in the U.S. Senate, "where bills go to die," as the saying goes.

The PEP legislation was viewed as a runaway train — unstoppable — with passage in the spring of 2017 viewed as likely. But the November elections stopped it, or at least delayed it, in the reexamination of priorities that followed the elections. Since then, several new bills favorable to MEPs have been proposed, including a bipartisan and bicameral (*i.e.*, introduced in the same form in both the House and the Senate) PEP bill.[1]

The consensus today is that the question is not *if*, but *when*, MEP legislation will pass, although nothing is certain. So what does this actually mean? The answer is found in both the history and the practical realities of MEP law, regulation and industry practice.

A HISTORY OF MEPS

To understand why Congress feels that MEP legislation is a good idea, some historical perspective is helpful.

THE ORIGINAL MEPs

Multiple employer plans predate ERISA as well as most relevant tax and securities law. MEPs date to the early 20th Century, and a handful of large MEPs in existence today started at that time. Group trusts, similarly, predate most modern tax, labor and securities laws and regulations. Unions were early adopters of multiple employer programs, and the Labor Management Relations Act of 1947 formalized this variant and called them "multi-employer plans," a term we must preserve since MEPs and "multis" have different rules.

Legislation and regulation therefore had to account for these preexisting structures, and there was no coordination in terminology or rules — each legislative or regulatory effort viewed existing structures through its own lens and created its own rules and terminologies. Thus we have separate and non-uniform references to MEPs in ERISA and the Code, and we have terms like "Master Trust Investment Account" (MTIA), Common or Collective Trust (CCT), Collective Investment Funds (CIFs — what everyone has taken to calling "CITs" or "Collective Investment Trusts" even though no law or regulation uses that term), 81-100 group trust, Section 413(c) plan (the term for a MEP under the Code), and — of course — multiple employer plan.

The point is that the terms do not describe monolithic, uniform entities. Instead they are simply names created by rules written to govern structures that predated the rules — structures that are defined not by the rules but by trust or plan documents. A trust can therefore simultaneously be an 81-100 group trust, a CIF and a master trust. A program that allows two or more unrelated employers to join can be both a Section 413(c) plan and a MEP under ERISA — or it can be subject to the requirements of Section 413(c) yet not be a MEP for ERISA purposes due to the DOL's stance in Advisory Opinion 2002-04A, as discussed below.

Retirement practitioners are confused by this terminology. There is a tendency to think that, for example, an 81-100 group trust is a "thing" — that it is structured a certain way and has established characteristics. The reality, instead, is that there are special plans and trusts (such as MEPs and group trusts) and the regulators apply their rules to these plans and trusts. The plan or trust document defines the thing — not ERISA, not the Code, and not the securities laws, which instead simply dictate how the plan or trust must operate if it wishes to comply with Title I of ERISA, avoid taxation, and avoid the need to register as a security and/or investment company under the '33 and '40 Acts.[2] In summary, a MEP's governing documents define it — laws and regulations simply constrain it. The governing documents are the thing; the laws and regulations control the thing.

If you want to understand MEPs, what you probably mean is that you want to understand MEP rules, and things like how to start and run them successfully within those rules. The starting point is to understand that there is a wide degree of variability in how different legislators, regulators and industry members view MEPs. If you seek a document or government treatise that reveals all, get over it — no such simple clarity exists.

That said, MEPs are not more complicated than other plan designs — it's just that so few people have

[1] H.R. 1688 and S. 695, "To avoid duplicative annual reporting under the Internal Revenue Code of 1986 and the Employee Retirement Income Security Act of 1974, and for other purposes."

[2] The Securities Act of 1933 and the Investment Company Act of 1940 require registration of securities and investment companies. A trust — or a MEP — might be viewed by the SEC as a security and as a mutual fund subject to '33 and '40 Act registration, unless the structure qualifies for an exception or exemption.

experience with them. That lack of widespread industry experience translates into inertia. The next five to ten years will change that — everyone will know MEPs in 2027.

The Classic 'Closed' MEPs — Related Groups

According to a 2012 study published by the Government Accountability Office (GAO),[3] in 2009 MEPs represented 0.7% of all plans filing a Form 5500, or roughly 5,000 MEPs in total. Speaking anecdotally based on the author's experience, the vast majority of these 5,000 MEPs are related groups — MEPs made up of two or more employers with common ownership or business relatedness that does not rise to the level of creating a controlled group or affiliated service group.[4] For example, if Jane Smith owns 20% of four companies and 100% of JS Enterprises (JSE), Jane owns interests in five separate companies for qualified plan purposes. But if all five companies look to Jane for leadership, a MEP with JSE as the "lead employer" would be a logical structure.

The MEP universe can thus be described as comprising roughly 5,000 programs, the vast majority of which are related groups of employers, and the rest of which come from PEOs, associations, long-standing trade group programs and a few others that meet the MEP definition.

Since most MEPs are related groups, and related group MEPs are based on a lead employer, many MEP plan documents use language that can be interpreted as presuming that there will be a lead employer, since this is the norm. But all other types of MEPs typically have a different sponsorship structure. One of the misunderstandings about MEPs is that the lead employer structure is the only available structure.

The Rise of the Open MEP

In 2002, the IRS published Revenue Procedure 2002-21, which required Professional Employer Organizations (PEOs) to change how they ran their retirement plans. Prior to 2003, PEOs viewed themselves as "co-employers" with their customers, the "recipients," for qualified plan purposes. The PEO would therefore offer a retirement plan and make that plan available to the recipients' workers, using benefit formulas based on the premise that all of these workers were employed by the PEO.

A long chain of legal events challenged the "co-employer" notion in certain respects, with the result that the IRS determined that recipient employers were generally the common law employers of the workers — the PEO was not the common law employer — meaning that the PEO could not simply offer its own plan to recipients' workers. Rev Proc 2002-21 therefore gave PEOs three options:

1. spin all recipients out into their own single employer plans;
2. convert their plans to MEPs; or
3. have the plan be disqualified if option 1 or 2 wasn't completed by the deadline in 2003.

The MEP Gold Rush

PEOs therefore planted the seed that grew into the notion of the "open" MEP — a MEP in which members were not all part of a single, long-standing trade group or association, or a group of related employers. Industry innovators close to PEOs looked at the PEO MEP structure and said, "Hey, this is cool. We should create a truly 'open' MEP that is not tied to the PEO." A handful of MEP specialists therefore did exactly that, and launched successful programs.

Between 2002 and roughly 2011, therefore, a bit of a gold rush developed. Everyone was going to start their own MEP. The image of prospectors staggering down the street, chunks of gold in one hand and whiskey bottle in the other, is probably a bit unfair in most ways, but not in one important respect: the "gold rush" toward MEPs included some crazy talk. People were going to sponsor their own MEPs and appoint themselves as fiduciaries and service providers. Some planned to involve layers of service providers, investment managers, payroll providers, and others — all receiving compensation — that might have raised costs significantly, in some cases. In other words, there was much talk of MEPs, and some of that talk proposed structures that are not okay.

The 2003-2011 MEP gold rush experience tells us several things:

- interest in MEPs was widespread;
- knowledge of MEPs was not; and
- the gold rush ended when the DOL threw a wet blanket on the party.

The DOL's Wet Blanket

The DOL stepped in and said, in effect, "I don't think so." In 2010 and 2011, there were rumblings that the DOL might not like the open MEP structure. To put the issue to rest, there were a number of meetings between the DOL and MEP proponents, including a meeting in the summer of 2011 at which the DOL cast doubt on whether it viewed open MEPs as "single plans" for ERISA purposes. Since this stance was viewed as quashing the concept of open MEPs, those who were sponsoring and running open MEPs at the time were naturally concerned.

In response, TAG Resources, a well-known multiple employer program administrator, requested an advisory opinion. ERISA attorney

[3] "Private Sector Pensions: Federal Agencies Should Collect Data and Coordinate Oversight of Multiple Employer Plans," Report to the Chairman, Committee on Health, Education, Labor, and Pensions, U.S. Senate, September 2012.

[4] Five companies that are all members of the same controlled group or affiliated service group would be considered a single plan for compliance purposes, not a MEP.

Bob Toth, who drafted the TAG letter, relayed after the fact[5] that:

- the DOL often provides an opportunity to withdraw an opinion request if it appears likely that the result will be unfavorable, and
- the preliminary, informal feedback suggested the result would be favorable; but
- a key event intervened, and that event may have caused the DOL to publish an opinion unfavorable to TAG, and to do so without providing an opportunity to withdraw the request.

That event is what might be called "the Hutcheson affair." It is worth mentioning because it affects the possible form of PEP legislation if or when it finally comes.

The Hutcheson Affair

An early proponent of MEPs and fiduciary status for advisors and other service providers was Matthew D. Hutcheson, who had launched several MEP programs. Hutcheson was a fairly public figure, and was an advisor on pension issues to George Martin, former U.S. Representative for California and Chairman of the House Education and Labor Committee.

In early 2012, the DOL became aware of events that caused it to file a civil complaint against Hutcheson alleging various prohibited transactions and breaches of fiduciary duty.[6] Ensuing criminal litigation resulted in Hutcheson's conviction on 17 felony counts, including wire fraud and misappropriation of more than $3 million from the MEPs he served as fiduciary. He was sentenced to more than 17 years in prison.

In retrospect, it seems likely that the Hutcheson case affected the DOL's actions with respect to the TAG letter.

Advisory Opinion 2012-04A

The TAG request led to the DOL's publication in May 2012 (just two weeks after its filing of the civil complaint against Hutcheson) of Advisory Opinion 2012-04A, the "TAG letter." The letter said:

- Open MEPs are not single plans for ERISA purposes — they are viewed by the DOL as a collection of single employer plans sponsored by each adopting employer.
- In order to be considered a single plan for ERISA purposes, six factors would be considered based on facts and circumstances. The two most important factors are **nexus** and **control**.

Nexus. All adopting employers in a MEP must have a "genuine organizational relationship" or "employment based common nexus" in order for the group of employers to meet the definition of "employer." And without an employer,[7] there can be no sponsor,[8] generally speaking. The DOL provided examples of what such a relationship looks like, and the fact pattern is narrow — most existing open MEP providers in 2012 would not qualify.

Control. The adopting employers must control the program. Here is the language from the letter describing the factors that are taken into account for purposes of determining whether a group of employers is "bona fide" and therefore able to act as an employer for adopters:

> "…relevant factors in determining whether a purported plan sponsor is a bona fide group or association of employers include the following: how members are solicited; who is entitled to participate and who actually participates in the association; the process by which the association was formed, the purposes for which it was formed, and what, if any, were the preexisting relationships of its members; the powers, rights, and privileges of employer members that exist by reason of their status as employers; and *who actually controls and directs the activities and operations of the benefit program. The employers that participate in a benefit program must, either directly or indirectly, exercise control over the program, both in form and in substance…*" (emphasis added)

The fact that adopting employers are treated as "co-sponsors" who are separately controlling the program through the decision to participate was not, in the DOL's view, sufficient to cause the overall group to meet the definition of "plan sponsor."

The issue of control and sponsorship is a critical one for understanding what might evolve under PEPs or other legislation. More on this below.

The Practical Impact of 2012-04A

If open MEPs are not single plans for ERISA purposes, what does this mean? For ERISA purposes, it means that all of ERISA's provisions must be satisfied separately for each adopting employer. But, because MEPs centralize fiduciary roles and service providers, the practical impact is that each adopter must file a separate Form 5500 — with an audit report, if the adopter is large enough to require an audit — and obtain a separate ERISA bond.

Note that the DOL's opinion relates only to ERISA: "The Department is not expressing any opinion in this letter on the application of section 413(c) of the Internal Revenue Code…" In other words, whether or not a plan is a "Section 413(c) plan" as defined by

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[5] At an industry conference presentation.s

[6] A summary of the various legal actions in *Perez v. Matthew d. Hutcheson, Hutcheson Walker Advisors LLC* is provided at https://casetext.com/case/perez-v-matthew-d-hutcheson-hutcheson-walker-advisors-llc.

[7] ERISA Section 3(5).

[8] ERISA Section 3(16)(B).

the Code is a matter for the IRS, not the DOL.

Industry Response Since 2012

Industry understanding of MEPs was limited in 2012, and MEP promoters often reduced the sales pitch to: "You don't need a Form 5500 or an audit." When the advantage of having only a single Form 5500 and audit for the entire arrangement disappeared, no one knew what advantages remained — the sales advantage, and therefore the reason to do a MEP, seemed lost.

More importantly, the TAG letter was scary to the industry. Brokers began attempting to sell MEP adopters on moving out of MEPs to single employer plans advised by the broker on the grounds that "the DOL has made MEPs illegal." The initial response was therefore an abrupt end to the MEP gold rush. Those who were exploring MEPs stopped exploring them. And those running open MEPs responded in one of three ways, for the most part:

1. Get out of the MEP business.
2. Change the structure to a marketing bundle, not a MEP.
3. Retain a single plan document structure but treat each adopter as sponsoring a separate plan for ERISA purposes, with its own audit, bond and Form 5500.

The universe of MEP industry participants therefore shrank back to a small pool of long-term specialists.

CONGRESSIONAL ACTION TO PROMOTE MEPs

The DOL's stance was widely perceived as limiting the industry's ability to employ MEPs, but many members of Congress believe that MEPs can improve coverage and governance and reduce long-term costs in the retirement system. A variety of legislators therefore jumped in to sponsor legislation overriding DOL AO 2012-04A, while addressing other perceived obstacles to widespread MEP adoption.

Here is a sample of MEP proposals in Congress or from the White House prior to 2017:

- S.A.V.E. Act of 2011, reintroduced in 2015
- SAFE Retirement Act of 2013
- Cooperative and Small Employer Charity Pension Flexibility Act of 2013
- USA Retirement Funds Act
- Retirement Security Act of 2014, reintroduced in 2015
- Pooled Employer Plan proposed by President Obama in February 2016
- Retirement Security for American Workers Act of 2016
- Retirement Enhancement and Savings Act (RESA) of 2016

In 2017 there have been additional proposals:

- **Warner-Sanchez Retirement Plan Bill,** introduced in both the House and the Senate by bipartisan sponsors. Warner-Sanchez takes a bit of a minimalist approach to MEP legislation — rather than addressing who can sponsor one or whether a MEP requires nexus, it addresses only the Form 5500 and audit. It allows a "group of plans" (*i.e.*, those under the control of the same named fiduciaries, and having the same plan year and fund lineup) to file a single Form 5500 (to which the audit requirement attaches). Presumably such plans would not be MEPs for ERISA purposes and would thus need individual bonds for each employer, but otherwise the practical effect is similar to a full rollback of the DOL stance on open MEPs.
- **Retirement Security for American Workers Act,** which — like RESA, which passed the Senate Finance Committee on a vote of 26-0 — would introduce PEPs.

WHAT THE CURRENT PROPOSALS HAVE IN COMMON

The proposals share certain common elements, though few proposals include all of these elements:

- Mitigate or eliminate the "bad apple" rule
- Eliminate the DOL's nexus requirement
- Single Form 5500 and audit
- Not override the other DOL criteria (*i.e.*, it takes more than nexus to make a MEP)
- Audit relief for small/startup MEPs, in some cases
- Securities law issues are not addressed
- The Code's "single plan" definition for defined contribution plans is not addressed
- Some proposals create a new structure: the pooled employer plan
- All proposals enjoy bipartisan sponsorship and support

Perhaps more importantly, these bills would enshrine MEPs as a significant tool of social policy in the United States The significance of each major provision — or lack thereof — is discussed in more detail below.

The 'Bad Apple' Rule

Treasury Reg. §1.413-2(a)(3)(iv) says:

> "The qualification of a section 413(c) plan…is determined with respect to all employers maintaining the section 413(c) plan. Consequently, the failure by one employer maintaining the plan (or by the plan itself) to satisfy an applicable qualification requirement will result in the disqualification of the section 413(c) plan for all employers maintaining the plan."

The bad apple rule is often cited as a major obstacle to MEP adoption, but MEPs have been subject to this rule for decades without it ever having been applied, to the author's knowledge. Experienced MEP providers do not view the rule as a threat any more than the ordinary threat of disqualification to single employer plans.

There are two reasons for this. First, the IRS is not generally in the business of disqualifying plans, thereby harming participants, except in cases of egregious behavior by fiduciaries. Correction under EPCRS[9] is the focus, and rightly so, not disqualification. And direct experience with such corrections, including spinoffs of offending employers, suggests that the existing regulatory structure is sufficiently protective of MEP adopters and their employees — that new legislation, while welcome, may not be necessary.

The ability to spin off offending employers (*i.e.*, kick them out of the MEP, then correct their spun-off plan separately) is mentioned specifically in some of the recent MEP bills, but in reality there is already a long-standing precedent for spinoffs that has its roots in the language of the preamble to the Treasury Regulation (*i.e.*, the bad apple rule):

> "…in the rare case of total disqualification, hardship could result to the offending and nonoffending employers maintaining the plan. Although no exceptions to total disqualification are provided in the final regulations, it is expected the Service's administration of these provisions may shelter innocent and nonnegligent employers from some of the harsh results of disqualification. Accordingly, in a proper case, the Commissioner could retain the plan's qualified status for innocent employers by requiring corrective and remedial action with respect to the plan such as allowing the withdrawal of an offending employer, allowing a reasonable period of time to cure a disqualifying defect, or requiring plan amendments to prevent future disqualifying events."

Thus, while "bad apple" is a legitimate concern for MEP administrators and adopters, in actual practice the evidence is that offending employers have been required to correct under EPCRS, that disqualification is viewed as a last resort for MEPs just as it is for single employer plans, and that spinoffs have historically been permitted in lieu of MEP disqualification.

Eliminating the Nexus Requirement

The DOL's insistence on a common nexus or preexisting organizational relationship among MEP adopters is at the heart of why open MEPs are not widely promoted today. Overruling the DOL on this subject is therefore the principal focus of all of the MEP bills in Congress. The elimination of the nexus requirement would mean that a Section 413(c) plan (*i.e.*, a MEP for purposes of the Code) would be a single plan under ERISA, regardless of whether the adopters are related. The MEP would therefore file a single Form 5500 with a single audit and bond for the entire arrangement.

One of the MEP bills — the bicameral Warner-Sanchez bill — takes a different approach to the nexus issue. Instead of overriding the DOL guidance, it simply addresses the Form 5500 (and therefore the audit) issue by providing that "groups of plans" may file a single 5500 if they have the same fiduciaries, fund menu and plan year.

This approach, if adopted, is interesting in that it might effectively allow for open MEPs — Section 413(c) plans with no nexus — that are still technically not single plans for ERISA purposes (*i.e.*, AO 2012-04A would still stand) to behave as if they were MEPs for both Code and ERISA purposes. The "groups of plans" might not be "true" MEPs (*i.e.*, single plans under both the Code and ERISA), but the distinction would be mostly moot because there would be almost no difference between these "groups of plans" and MEPs.

The Audit Issue

Is it better or worse for a MEP to have a single Form 5500? Most observers believe instinctively that it is better to have a single 5500, but employers in actual MEPs today do not necessarily see things this way, because of the audit requirement.

Plans are required to file a Form 5500 in accordance with ERISA's reporting and disclosure requirements,[10] and the audit is actually a part of the Form 5500. In a MEP, having a single 5500 also means having a single audit, which is great for employers who would have had an audit anyway, not so great for small plan filers.

Here are two examples of how audit requirements affect adopting employers in actual application.

Audit plan likes a closed MEP. An employer with fewer than 100 eligible participants has a stand-alone 401(k) that is not subject to the audit requirement in 2014 — it was a "small plan filer." But by the end of 2015, the employer grew to more than 120 eligible participants, triggering the need to include an audit with the Form 5500. The employer finds the added labor, headaches and expense of the audit to be a burden. In 2017, the employer's 401(k) becomes part of a closed MEP — a MEP that is a single plan for ERISA purposes. The employer still has to participate in a plan audit, but to a much lesser degree — the auditor will likely involve the employer only one year in three, and then mostly for auditing of payroll, with the remainder of the audit focusing on administrative

[9] Employee Plans Compliance Resolution System, the IRS program for correcting plan defects.
[10] 29 USC 1021-1024.

functions for which the responsible party is the plan administrator, not the employer. Furthermore, the audit cost is shared across the plan, so it is much cheaper. This large plan filer therefore loves the MEP's ability to file a single 5500.

Small plan filer does not like getting audited. Contrast this with a small employer which never has 100 or more eligible participants. This employer was never subject to an audit. In 2016, however, the employer became part of the same closed MEP as in the previous example, and therefore became subject to the audit — even though only on a limited basis — and pays a part of the audit costs. Some small employers, upon joining a closed MEP, are therefore not pleased with these added burdens.

The congressional MEP proposals all provide for the ability of a MEP to file a single Form 5500 with a single audit. Because of the perceived burden of the audit for small employers, especially for startup MEPs, some of the proposals provide for audit relief — *i.e.*, no audit is required until the MEP reaches a certain size, such as 500 or 2,500 participants. Such relief would be a significant aid to startup MEPs.

Avoiding Registration Under Securities Law

There is an issue of interest to MEP advocates that the congressional proposals could address, but do not: Is a MEP subject to registration as a security under the Securities Act of 1933 ('33 Act) or as an investment company (mutual fund) under the Investment Company Act of 1940 ('40 Act)?

A trust that serves more than one employer's retirement plan is generally viewed by the SEC as subject to registration unless an exception or exemption applies. The most logical exemption is the qualified plan exemption (*i.e.*, qualified plans are not subject to registration under §3(c)(11) of the '40 Act), but the SEC position is that, in order for the qualified plan exemption to apply, the trust must be a "single trust":

> "Section 3(c)(11) of the 1940 Act, in pertinent part, excepts from the definition of 'investment company' any 'employee's stock bonus, pension, or profit-sharing trust which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1986' (*i.e.*, the 'single trust exception')… The Commission considers each of the following to be a single trust fund for the 'single trust exception:' (1) a trust fund for employees of a single employer; (2) a trust fund for employees of employers so closely related as to be regarded a single employer (*e.g.*, a parent and its subsidiaries); and (3) a trust fund established and controlled by employers and/or a union representing the employees of such employers."[11]

In point of fact, most long-standing MEPs operate under a single trust, but a plain reading of the SEC guidance leaves doubt as to whether this approach suffices — though such programs have never been questioned by the SEC, to the author's knowledge. But in the new world of MEP proliferation, it would be helpful to have clarity on this point for all MEPs — not just PEPs or other newly created structures.

In the absence of an exception or exemption to registration, MEPs cannot avoid registration as investment companies unless they:

- use a collective investment fund (CIF — what the industry has taken to calling a "CIT"), which is less burdensome than investment company registration but still requires a trust document, a bank trustee, an audit and filing as a Direct Filing Entity (DFE — a type of Form 5500 filing for entities such as CIFs and insurance separate accounts);
- avoid commingling of adopting employer assets such that each employer's portion of the arrangement is considered a separate trust; or
- qualify in some other way for an exception to the definitions of "security" and "investment company" or an exemption from registration as such (although no obvious path suggests itself).

It is important to note that this issue of whether a MEP must register under securities laws applies to all MEPs — not just open MEPs.

The 'Single Plan' Definition Under the Code

The way multiple employer plans are written into the Code is that if a plan is a "Section 413(c) plan," it is required to meet certain requirements in addition to the other qualification requirements.[12]

A Section 413(c) plan is defined as follows:

"A plan (and each trust which is a part of such plan) is a section 413(c) plan if –

i. The plan is a single plan, within the meaning of section 413(a) and § 1.413-1(a)(2), and
ii. The plan is maintained by more than one employer.

The references to 413(a) and the 413-1 regulation point us to the "single plan" definition under IRC Section 414(l). From the Treasury regulations under 414(l):

"Single plan. A plan is a "single plan" if and only if, on an ongoing basis, all of the plan assets are available to pay benefits to employees who are covered by the plan and their beneficiaries…A plan will not fail to be a single plan merely because of the following:

iii. (i) The plan has several distinct benefit structures which apply

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[11] From SEC No Action Letter re Honeywell International Inc Savings Plan Trust, Oct. 7, 2002.
[12] IRC Sections 413(c)(1)-(6).

either to the same or different participants,
iv. (ii) The plan has several plan documents,
v. (iii) Several employers, whether or not affiliated, contribute to the plan,
vi. (iv) The assets of the plan are invested in several trusts or annuity contracts, or
vii. (v) Separate accounting is maintained for purposes of cost allocation but not for purposes of providing benefits under the plan."

The problem with the single plan definition is that it was written with DB plans in mind, especially Taft-Hartley multiemployer plans, and it is difficult to construct a way in which the language could apply meaningfully to defined contribution (DC) plans. For example, the notion that Bob's account balance must stand behind Suzie's benefits claim is not only nonsensical, but conflicts directly with ERISA's anti-alienation provision.[13] Similarly, the notion that assets attributable to Employer A's participants must stand behind claims by Employer B's participants makes no sense. As a result, long-standing DC MEPs, in actual practice, do not subject any employer's or participant's assets to being taken by other participants.[14] Such an arrangement makes sense in a DB plan, but not in a DC plan.

It is important to note that these issues — the securities law "single trust" issue and the Code's "single plan" definition — have nothing to do with open MEPs. These are issues applicable to all MEPs, whether open or closed, and no currently proposed MEP/PEP legislation includes language that would change the situation.

What's a PEP?

All PEPs are MEPs, but not all MEPs are PEPs. In other words, a PEP is a type of multiple employer plan, but not all multiple employer plans need become PEPs — at least, not based on a plain reading of the proposals.

The legislative proposals that use the term "pooled employer plan" or PEP create a new type of MEP. The nature of the PEP is that, if it meets certain requirements, it is a single plan for ERISA purposes — thereby overriding the DOL's nexus requirement. The requirements to qualify for PEP status vary among the handful of proposals out there, but three common elements are:

- The PEP must be overseen by a pooled plan provider (PPP) that accepts responsibility for oversight of the plan as a named fiduciary and as the plan administrator, as defined by ERISA Section 3(16).[15]
- In some versions, the PPP must be a regulated financial institution — a provision that was created in order to protect participants from the sort of malfeasance seen in the Hutcheson affair described above.
- The adopting employers remain responsible for selection and monitoring of the PPP, and perhaps the plan investments.

What does this actually mean? Can we predict with any certainty, based on these proposals, how PEPs will work? The author thinks not — the practical reality is that: (1) these are just proposals; and (2) the devil is in the details, and the details will be spelled out in regulations.

That said, this stuff is not actually very complicated. The confusion is, in the end, about who's allowed to get paid.

It's Not About Nexus, it's About Control

The aspects of MEPs that trip everyone up are sponsorship and governance questions — who is allowed to be the sponsor, who are the named fiduciaries, who appoints and monitors the named fiduciaries, and, above all, who determines who gets paid and how much?

Consider the typical ERISA plan: An employer sponsors the plan and appoints a trustee and administrator. As long as the sponsor does not wish to be compensated, it can self-trustee and self-administer. Generally speaking, sponsors and fiduciaries cannot get paid for providing services unless their services and compensation are approved by an independent fiduciary.[16] Thus, as long as you have employers who are not compensated serving as sponsors, they can appoint fiduciaries and determine how much to pay them.

The key to understanding MEPs is not how to get around the nexus requirement — the nexus requirement does not matter very much unless you care about filing a single 5500. The key requirement, instead, is *control*. The adopting employers need to have "control in fact."[17] A MEP structure that puts adopting employers firmly in control — in both form and substance — is probably a safe one. A structure that attempts to let service providers sponsor plans and appoint themselves to provide services for compensation is not allowed in single employer plans, and there is no reason to suppose that the regulators will like such a structure any better in a PEP.

The eyes of the industry have been on the nexus requirement and DOL Advisory Opinion 2012-

[13] ERISA §206.
[14] Note, however, that MEP administrators must choose what to do with forfeitures or other unallocated amounts. Most modern MEP documents include language whereby such funds may be applied on either an employer-by-employer basis or on a plan-wide basis.
[15] See the actual ERISA definition under Section 3(16), and note that meeting this definition is not the same as offering "3(16) services." The requirement is that the fiduciary must be the plan administrator, not help the plan administrator.
[16] 29 CFR 2550.408b-2(e).
[17] DOL AO 2012-04A.

04A, when perhaps they should be on the control requirement, and on what happens when plans lack a nice, clean ERISA chain of appointment. For an instructive example of what to avoid, see the DOL's news release[18] about its settlement with the National Rural Electric Cooperative Association (NRECA) — a long-standing trade group MEP provider that was fined more than $30 million based on the DOL's contention that the NRECA had appointed itself and determined its own compensation.

The solution is simple: Make sure that the clients are truly in charge of the plan.

The Problem with PEP Legislation

The various PEP proposals create an entirely new structure — the PEP — but only solve problems for that structure. Existing MEPs (nearly 5,000 of them) would have to convert to PEPs if they wished to gain any advantages offered by the new structure, yet the expense of such a conversion might not be in the best interests of the plan or its participants and adopting employers. For example, if PEP legislation eliminated the bad apple rule, would it be worth the cost and effort of changing the plan to a PEP just to get bad apple protection, especially if the MEP administrator is not greatly concerned about the bad apple rule in the first place?

An alternative or supplement to PEP legislation would be legislation that identifies all pertinent obstacles to MEP formation and adoption and addresses those obstacles uniformly for all MEPs.

DO WE ACTUALLY NEED LEGISLATION?

There is an argument to be made that MEP-friendly legislation is unnecessary because the benefits of MEPs can be realized using available structures. For example, an "open MEP" may not be a single plan for ERISA purposes, but how important is it to have a single 5500? And of what use is a MEP audit to a small plan filer, who would be exposed to the burdens of a payroll audit in a closed MEP yet not in a single-employer plan? The applicability of Code Section 413(c) is based on the tax statute and regulations, not DOL rules. So the fact that a program operating in accordance with Section 413(c) is not a "true MEP" might be irrelevant from a plan sponsor's or participant's perspective if key advantages are present.

Some of the benefits of MEPs can be realized through a variety of programs that have arisen in recent years, such as the use of group trusts and marketing bundles going by names such as "aggregation arrangements," "small plan solutions" or "exchanges." Such arrangements can include fiduciary outsourcing options and economy of scale, even if they do not enjoy the same degree of simplicity for adopters that is possible in a MEP. It is true, however, that the centralized governance structure mandated by the nature of a MEP is an advantage that is difficult, if not impossible, to duplicate in other structures.

In short, legislation favorable to MEPs will unquestionably help promote MEPs, but may not actually be necessary from a technical perspective.

A NEW MEP GOLD RUSH?

It is unclear if or when new MEP legislation might be passed, but the consensus on the government affairs front appears to remain that some sort of MEP-friendly legislation is likely, and probably sooner rather than later. From conversations with service providers and advisors across the retirement industry, it is clear that the industry is gearing up for a new MEP gold rush. Recognition of the benefits of MEPs is now wide-spread. Advisors and providers are actively seeking MEP knowledge, strategies and solutions. Many are delaying action to see what Congress does, but others are taking action now. What does seem clear is that the use of the multiple employer plan design is poised for significant growth.

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[18] Available at DOL.gov; search for "NRECA."