



# Pentegra's 2018 Stance on Open MEPs

A WHITE PAPER BY

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*On the Friday before Memorial Day 2012, the DOL published guidance on open multiple employer plans (open MEPs) saying they are not “single plans” under ERISA, and thereby slowed participation in MEPs. Pentegra responded at that time by publishing [Pentegra's Stance on Open MEPs](#)—expressing positions we continue to support today. Six years later, on the Friday before Labor Day 2018, President Trump signed an executive order that directs the IRS and DOL to consider regulations or guidance that would expand the availability of open MEPs. This white paper reiterates and extends Pentegra's 2012 thoughts with an eye toward the future and in the context of this new retirement initiative from the Trump Administration. This is Part 1 of 2, discussing the Executive Order itself. Part 2 discusses what it might mean for the U.S. retirement system.*

## Introduction

The purpose of the timing of this paper—immediately after the signing of the Executive Order promoting MEPs—is to spur constructive dialogue nationally about the best path forward with respect to MEPs.

The interest in group retirement plan solutions—including MEPs, group trusts, and “exchange” or “aggregated” programs designed to mimic MEPs—is at an all-time high even though very few know how to start and govern MEPs. Congress has [expressed its support for MEPs](#) going back nearly a decade, as evidenced by more than fifteen bipartisan pro-MEP bills introduced since 2010.<sup>1</sup> And now the president is directing the DOL and IRS to expand the availability of MEPs, based on the premise that MEPs can reduce costs and burdens associated with providing a retirement plan. It seems likely that the Executive Order will accelerate interest in MEPs.

It is Pentegra's experience that a well-governed MEP is a simple, safe, cost-effective tool for employers to provide retirement benefits to their employees, and that MEPs have a structural advantage over single employer plans. Simplistically, 100 employers banding together to sponsor a single plan is more efficient than 100 employers sponsoring 100 plans with 100 trustees, administrators, and retirement committees. Because this efficiency is based on the structure itself, it is understandable that Washington is interested.

The intent of this white paper is to help interested parties of all kinds—including employers, investment advisors, service providers, and current and future MEP sponsors—join the dialogue and create the best possible future for American workers.

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<sup>1</sup> For a rundown of MEP proposals through 2014, see “Congress' Love Affair with MEPs” at [www.pentegra.com](http://www.pentegra.com); multiple legislative proposals have emerged since that article was published, including RESA, discussed in Part 2 of the paper

## Executive Summary

### Overview: The Trump Administration Wants to Expand the Use of MEPs

An Executive Order dated Friday, August 31, 2018, with an accompanying public signing ceremony in Charlotte, North Carolina, is strongly supportive of multiple employer plans (MEPs). The order calls for the DOL and IRS to consider guidance that would expand MEP usage. This two-part white paper covers the points summarized below. Part 1 discusses the Executive Order itself. Part 2 will review existing MEP law and regulation and how the Executive Order might affect them, and will end with suggested talking points for future policy discussions.

### Context

1. **MEPs have been around a long time.** MEPs have been around for nearly a century, and have advantages over single employer plans.
2. **But not broadly promoted, historically.** There are approximately 5,000 MEPs in the U.S.<sup>2</sup> (less than 1% of plans filing a Form 5500), but their application has been limited historically to related employers and a few trade groups—MEPs have not been broadly promoted despite their advantages.
3. **The MEP “gold rush.”** Between 2003 and 2012, there was a “gold rush” of innovators hoping to establish new MEPs and promote them broadly.
4. **The TAG Letter slowed the rush.** In 2012, the Department of Labor (DOL) published Advisory Opinion 2012-04A (the “TAG Letter”), which provided that MEPs that do not meet certain criteria must be treated as single employer plans under ERISA<sup>3</sup>, requiring a separate Form 5500 (and therefore audit, if applicable) and an ERISA bond for each participating employer instead of a single 5500/audit/bond for the entire MEP. The Letter effectively slowed development of new MEPs.
5. **“Open” vs. “closed” MEPs.** A “closed” MEP meets the TAG Letter requirements to be a “single plan” with one 5500/audit/bond for the whole arrangement. An “open” MEP is one that nearly any employer can join, but each adopting employer must have its own 5500/audit/bond. “Open MEP” and “closed MEP” are terms of convenience, not law.
6. **“Nexus” or “commonality” is the key difference between open and closed MEPs.** To be a closed MEP, the MEP members must share pre-existing organizational relationships or a common “nexus” beyond simply the provision of employee benefits. Nexus is at the heart of the TAG Letter.
7. **Even associations may not have enough nexus today.** Simply being a membership association is not enough to ensure “closed” status under the TAG letter for an association MEP. Chambers of commerce, for example, are widely viewed as not having sufficient nexus, and programs they offer today therefore require a separate 5500/audit/bond for each adopting employer.
8. **The “one bad apple rule”.** There is a Treasury Regulation that says a compliance failure by a single participating employer can disqualify the whole MEP. While this rule in actual implementation is not one that alarms experienced MEP providers, it is widely perceived to be an obstacle to new MEP formation.
9. **Congress’ love affair with MEPs.** Numerous (15+) bipartisan MEP bills have been proposed in Congress since 2010, nearly all of them aimed at overturning the nexus requirement of

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<sup>2</sup> From *Federal Agencies Should Collect Data and Coordinate Oversight of Multiple Employer Plans*, by the U.S. Government Accountability Office (GAO), September 2012.

<sup>3</sup> Employee Retirement Income Security Act of 1974, as amended

the TAG Letter and mitigating fears about the “one bad apple rule” to spur broader adoption of MEPs.

10. **“Ten years of wrangling.”** Pro-MEP, bipartisan legislative proposals offset by cautious regulatory positions are the public face of what has been described as “ten years of wrangling” in Washington over MEPs for both retirement and healthcare.

### What to Expect

1. **Association Health Plans (AHPs) could be the model.** Legislators, regulators, and other interested parties reached sufficient agreement with respect to Association Health Plans (AHPs)—a type of multiple employer plan for healthcare programs. The DOL issued final regulations that became effective August 20, 2018. The AHP rules may serve as a template for similar rules on retirement plan MEPs.
2. **How quickly might new guidance be forthcoming?** The Executive Order calls for a formal response, if not actual guidance, within 180 days. The timing of guidance will depend on its type—in particular, whether the DOL and IRS will issue new regulations or instead opt for “sub-regulatory” guidance.
3. **“Sub-regulatory” guidance can be fast.** “Sub-regulatory” guidance (an interpretation of existing regulations, rather than a regulation itself), such as a Field or Technical Advice Memorandum, is easier and quicker than either legislation or regulation. And sub-regulatory guidance may be sufficient to accomplish some or all of the Executive Order’s policy goals with respect to MEPs.
4. **Major policy changes require formal process.** The DOL and IRS lawyers may opt for a conservative approach—that new rules on MEPs constitute a significant policy change, and that a formal public comment and review process is required. This will take longer.
5. **What this means for the U.S. retirement system.** Pentegra’s belief is that MEPs are poised to grow significantly beyond the 1% market share they currently enjoy, and that the Administration’s support for MEPs will speed this growth.
6. **Powerful tool, not silver bullet.** MEPs will not single-handedly close the retirement plan coverage gap or cut plan costs in half—as some suggest they will—but they enjoy a genuine structural advantage over single employer plans. This advantage is the driving force behind Washington’s interest in and the future growth of MEPs.

### Join the Dialogue

Pentegra supports MEPs as a useful tool for improving retirement security in the U.S. and believes interested parties should educate themselves on MEPs and participate in the dialogue.

## The Executive Order

On August 31, 2018, President Trump signed an Executive Order on Strengthening Retirement Security in America ("Executive Order"). There were three basic provisions:

1. Pave the way for expanding the availability of MEPs
2. Improve retirement plan notice and disclosure rules, including the possibility of expanding the use of electronic delivery
3. Reduce Required Minimum Distributions ("RMDs")—the amount retirees must draw from retirement accounts annually so that taxes are not indefinitely deferred—allowing savers to delay withdrawals.

This white paper is about MEPs and will therefore not address RMDs. Electronic delivery of notices is tangentially related to MEPs and is discussed briefly.

Key excerpts from the Order include:

### Policy

"It shall be the policy of the Federal Government to expand access to workplace retirement plans for American workers...Enhancing workplace retirement plan coverage is critical to ensuring that American workers will be financially prepared to retire...Regulatory burdens and complexity can be costly and discourage employers, especially small businesses, from offering workplace retirement plans to their employees." Therefore, "Federal agencies should revise or eliminate rules and regulations that impose unnecessary costs and burdens on businesses, especially small businesses, and that hinder formation of workplace retirement plans. Expanding access to multiple employer plans (MEPs), under which employees of different private-sector employers may participate in a single retirement plan, is an efficient way to reduce administrative costs of retirement plan establishment and maintenance and would encourage more plan formation and broader availability of workplace retirement plans, especially among small employers."

### Expanding Access to MEPs and Other Options

In the section "Expanding Access to Multiple Employer Plans and Other Retirement Plan Options," the following excerpts cover MEPs.

"The Secretary of Labor shall examine policies that would:

1. clarify and expand the circumstances under which United States employers, especially small and mid-sized businesses, may sponsor or adopt a MEP as a workplace retirement option for their employees, subject to appropriate safeguards; and
2. increase retirement security for part-time workers, sole proprietors, working owners, and other entrepreneurial workers with non-traditional employer-employee relationships by expanding their access to workplace retirement plans, including MEPs."

The Secretary of Labor is given the following deadline with respect to these two objectives:

"Within 180 days of the date of this order, the Secretary of Labor shall consider, consistent with applicable law and the policy set forth in section 1 of this 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 section 3(5) of the Employee Retirement Income Security Act of 1974 (ERISA)...”

The fact that this directive is so specific is meaningful. It appears to suggest that the Administration already has a good idea of what it plans to do—write new guidance on who is considered an “employer” under ERISA Section 3(5). The implication would appear to be that DOL Advisory Opinion 2012-04A, known as “The TAG Letter,” is going to be replaced with new guidance redefining what constitutes a “bona fide”<sup>4</sup> “group or association of employers”<sup>5</sup>—since the TAG Letter is the specific guidance standing in the way of the policy objectives. In addition to the instructions for the Secretary of Labor, the Executive Order directs the Secretary of the Treasury to

“...consider proposing amendments to regulations or other guidance, consistent with applicable law and the policy set forth in section 1 of this order, regarding the circumstances under which a MEP may satisfy the tax qualification requirements set forth in the Internal Revenue Code of 1986, 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. The Secretary of the Treasury shall consult with the Secretary of Labor in advance of issuing any such proposed guidance, and the Secretary of Labor shall take steps to facilitate the implementation of any guidance, as appropriate and consistent with applicable law.”

As with the instructions to the Secretary of Labor, this is quite specific: in this case, the focus is apparently on the “one bad apple rule” of Treasury Reg. Section 1.413-2(a)(3)(iv)<sup>6</sup>. This is not explicitly stated but is clear from the reference to “if one or more employers...fails to take one or more actions” necessary to meet qualification requirements.

### Summary of the Executive Order’s MEP Provisions

#### 1. Policy:

- It shall be the policy of the Federal Government to expand access to workplace retirement plans.
- Regulatory burdens and complexity can be costly and discourage employers from offering retirement plans.
- Federal agencies should change rules that impose burdens that hinder formation of workplace retirement plans.

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<sup>4</sup> The TAG Letter’s position is based on years of prior DOL guidance, in which it took the position that a “group or association of employers” is only an “employer” if is a “bona fide” group or association—it is the DOL’s creation of the “bona fide” requirement that creates the issue of whether open MEPs are single plans.

<sup>5</sup> Section 3(5) of ERISA is the definition of “employer,” and an “employer” includes a “group or association of employers”—a plain reading of which would appear to permit a fairly broad interpretation of what constitutes a “group or association”

<sup>6</sup> This is called the “one bad apple rule” since a qualification failure by any single adopter can disqualify the whole MEP. In reality, MEP practitioners today are not concerned by the bad apple rule any more than they are of compliance defects in a single employer plan. The IRS’ preferred cure for plan defects is correction, not disqualification.

- Expanding access to MEPs is an efficient way to reduce costs of plan startup and maintenance and would encourage broader availability of workplace retirement plans.
2. Expanding Access to MEPs and Other Options
    - The Secretary of Labor should:
      - Clarify and expand the circumstances under which employers can sponsor or adopt a MEP, but *subject to appropriate safeguards*
      - Expand access to retirement plans for “part-time workers, sole proprietors, working owners, and other entrepreneurial workers with non-traditional employer-employee relationships”
    - The Secretary has 180 days to decide “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’” for purposes of ERISA Sec. 3(5) (the definition of “employer” under ERISA—because only an “employer” can sponsor a MEP or other retirement plan).
    - The Secretary of Treasury has 180 days to “consider proposing amendments to regulations or other guidance” to mitigate the perceived obstacle of the “one bad apple rule” whereby a single failure by a single adopting employer could disqualify an entire MEP (in theory).

In short, the Executive Order appears to be aimed primarily at two things:

1. **The TAG Letter, and Specifically the Definition of “Employer.”** The “nexus” requirement that has slowed the use of MEPs and the inability of contractors and self-employed individuals to join a 401(k) plan (without sponsoring their own) are embedded in the ERISA Sec. 3(5) definition of “employer,” which is at the heart of the TAG Letter. The first objective would therefore appear to be replacing the guidance in the TAG Letter.
2. **The One Bad Apple Rule.** Assuaging fears about this Treasury Regulation would eliminate a perceived obstacle to MEP formation.

### Notices and Disclosures

The Executive Order says:

“Within 1 year...the Secretary of Labor shall, in consultation with the Secretary of the Treasury, complete a review of actions that could be taken...to make retirement plan disclosures...more understandable and useful...while also reducing the costs and burdens they impose on employers and other plan fiduciaries responsible for their production and distribution. This review shall include an exploration of the potential for broader use of electronic delivery...”

The Executive Order’s provision with respect to notices and disclosures is pertinent to MEPs in that MEPs must, by necessity, be very concerned with compliance details, and notice delivery is one such detail that is often handled incorrectly in single employer plans. This is because compliance with disclosure and notice delivery requirements can be spotty when handled by employers who are not experts on the rules and find the tasks burdensome and less urgent than other demands on their time.

A MEP fiduciary cannot afford to be lax with compliance requirements, and this affects plan costs. Mailings are a significant source of administrative cost in MEPs, the fiduciaries of which



tend to do a more orderly job complying with delivery rules. Electronic delivery can help control the cost.

## What is the Legal Effect of the Executive Order?

The President is the head of the Executive Branch of government, and as such has authority over the agencies of the Executive Branch—including the Department of Labor (DOL), Internal Revenue Service (IRS), and Securities and Exchange Commission (SEC), all of which have influence over retirement plans in the U.S. An Executive Order is simply a directive from the President telling the agencies how to enforce U.S. law. An Executive Order can be overturned in court if found to be unconstitutional or otherwise unlawful, but otherwise has the force of law.

That said, the Executive Order issued on August 31, 2018 did not make any specific changes. It simply instructed the DOL and IRS to “consider” new guidance. Consequently, the fact that the President supports MEPs and is directing the IRS and DOL to consider guidance supporting MEPs does not guarantee any changes will be made.

## What Does It Mean?

To understand the implications of the Executive Order and form a basis for dialogue around possible responses to it, some background will help. Part Two of this white paper will therefore cover the current state of MEP law and regulation and how the Executive Order may change the situation, and conclude with possible talking points for policy discussions.

## Conclusion

MEPs are a powerful tool with genuine structural advantages over single employer plans. They are a simple, safe, and cost-effective way for employers to offer retirement benefits and remove themselves from many unwanted fiduciary and administrative chores. They offer a platform for leveraging scale to negotiate the best possible deal for member employers and their employees. Recognition of these advantages in Washington has been widespread and bipartisan yet insufficient to result in action. The Executive Order on retirement security may change that, and will likely spur an acceleration in MEP interest and adoption. Pentegra with its 75 years of expertise and experience in running MEPs, looks forward to working with the DOL and IRS in finding ways to enhance the affordability of and accessibility to MEPs.

This is Part 1 of a 2-part series. Part 2 will address potential regulatory outcomes from the Executive Order, their possible impact on the U.S. retirement system, and possible talking points for discussions of policy.

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