Multiple Employer Plans: The Enigma Demystified

By S. Derrin Watson

The Department of Labor has issued Advisory Opinion 2012-04A (hereafter called "the Opinion"), which considered an "open MEP." The Opinion unambiguously ruled that the open MEP was not a single ERISA plan but rather a series of separate ERISA plans, one for each adopting employer. This article will discuss the Opinion and explore its ramifications, both for open MEPs and other multiple employer plan designs.

The Winter 2012 issue of the *Journal of Pension Benefits* (vol. 19, no. 2, p. 6) included the author's article "Multiple Employer Plans: An ERISA Enigma" (the "prior JPB article"). The prior JPB article discusses the history of DOL advisory opinions dealing with multiple employer plans (MEPs), and shows that if the DOL followed 30 years of precedent, it would likely rule that open MEPs were not single ERISA plans.

Opinion Summary

The Opinion indeed follows those precedents. The Opinion deals with the MEP offered by TAG Resources LLC (as plan administrator). Over 500 unrelated employers co-sponsored the plan. It is a classic example of an open MEP, with no relationship, outside of the plan, between the sponsoring employers. Its 2010 Form 5500 reflects that the plan had nearly 10,000 participants and $63 million in assets.

ERISA defines an employee pension benefit plan as being a "plan, fund, or program…established or maintained by an employer or employee organization or by both" which provides retirement income or deferral of income beyond termination of employment. If an arrangement isn't established or maintained by an employee organization (such as a union) or an employer, it is not an ERISA plan.

ERISA Section3(5) defines an employer as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." Historically and consistently, the DOL has interpreted the phrase "group or association or employers" as referring to a "bona fide group or association." The Opinion outlines some of the factors the DOL considers in determining whether such an association exists:

- 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 Opinion concludes "There is nothing in your submission to support a conclusion that a bona fide association or group of employers is sponsoring the Advantage Plan." In other words, not one of those factors supports treating the open MEP in question as a single plan under ERISA. The Opinion focused on the absence of employer control and the lack of "any genuine organizational relationship between the employers."

Rejected Arguments

The Opinion considered every legal argument currently raised to support open MEPs. It rejected each and every one of them.

Individual Employers Adopted Individual Plans. The Opinion focuses on the determination that the MEP sponsors are not a bona fide "group or association of employers" described in ERISA Section 3(5). MEP

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promoters say that in an open MEP, each individual employer is directly setting up a plan, thereby satisfying ERISA Section 3(5). The open MEP isn't an association adopting a plan on behalf of its members (but instead each individual employer chooses to enter the plan).

That line of reasoning actually supports the DOL's conclusion. Yes, each employer has adopted a plan, a separate plan under ERISA. The DOL's response couldn't be plainer:

> In your submission, you assert that there is no need for a bona fide employer group or association or for any person to be acting indirectly in the interest of the direct employers because each employer who enters into a participation agreement with TAG to provide benefits to its employees through the Advantage Plan will be acting as a Plan "co-sponsor," and "acting directly on its own behalf" in separately adopting a "multiple employer" defined contribution plan for its own employees. As described above, the mere execution of identically worded trust agreements or similar documents by unrelated employers as a means to fund or provide benefits for their employees, is not a sufficient basis for concluding that the employers have established or maintain a single plan for purposes of ERISA. *See, e.g.,* Advisory Opinion 2008-07A. Participation agreements that label the signatory employers as co-sponsors of a plan do not change this conclusion. Accordingly, it is the view of the Department that the Plan does not constitute a single "multiple employer" plan for purposes of ERISA, but rather is an arrangement under which each participating employer establishes and maintains a separate employee benefit plan for the benefit of its own employees.

ERISA Section 210 Does Not Change the Analysis. MEP supporters note correctly that ERISA Section 210 contains rules, much like Code Section 413(c), dealing with crediting hours of service in a MEP. Ergo, they reason, ERISA recognizes MEPs.

Of course, ERISA recognizes MEPs. There have been many advisory opinions recognizing a bona fide group or association, and therefore opining that the MEP was a single ERISA plan. ERISA Section 210 tells us what to do with such a plan. It does not say that every plan that calls itself a single ERISA plan is one. The Opinion notes:

> Contrary to your suggestion, section 210 of ERISA and the regulations implementing the minimum coverage and participation rules of Part 2 of ERISA do not dictate a different conclusion. While those regulations refer to section 413 of the Code at various points (*see, e.g.,* 29 CFR 2530.210(c)), they do not purport to make questions of ERISA coverage turn on section 413 of the Internal Revenue Code. To the contrary, as the Department's regulations make clear (*see* 29 CFR 2530.201-1), the determination of ERISA coverage is a multiple step process, and, in order for Part 2 of ERISA to apply, "[f]irst, the plan must be an employee benefit plan as defined under section 3(3) of the Act and § 2510.3-3. (*See also* the definitions of employee welfare benefit plan, section 3(1) of the Act and § 2510.3-1 and employee pension benefit plan, section 3(2) of the Act and § 2510.3-2)." This letter concerns only whether the Advantage Plan is an "employee benefit plan" under sections 3(2) and 3(3) of ERISA. For the reasons set forth above, in the Department's view, it is not.

Code Section 413(c) Does Not Provide All the "Commonality" MEPs Need. Some MEP supporters have argued that because MEPs are subject to Code Section 413(c), the co-sponsors automatically have "commonality" because they must count each other's service.

This argument misunderstands the meaning of commonality in this context. This is a shorthand phrase to describe the concept the Opinion refers to as the "preexisting relationships" of the MEP members.

A few recent advisory opinions, such the Opinion and Advisory Opinion 2005-20A, have used the word "commonality" to reflect those preexisting relationships. Elsewhere, the DOL has referred to this concept as an "organizational nexus" or a "genuine organizational relationship."

However it is expressed, the concept always refers to some shared interest outside of the retirement plan itself. For example, Advisory Opinion 2005-20A deals with a plan established by the Dunkin' Donuts Northeast Distribution Center, Inc. and Dunkin' Donuts franchisees. The DOL opined that, "The Franchisees and the Distribution Center have a commonality of economic interests and a genuine organizational relationship unrelated to the provision of benefits under the Plan. Each Franchisee owns a fractional interest in the Distribution Center."

Surely, the applicability of Code Section 413(c), which requires MEP sponsors to count service provided to other MEP sponsors, does nothing to establish that there is a relationship between the employers that is "preexisting." Whatever "relationship" 413(c) reflects comes only after the plan is established.

Two quotes from the Opinion are helpful here:

> The Department is not expressing any opinion in this letter on the application of section 413(c) of the Internal Revenue Code (Code) to the Advantage Plan. Code Section

> 413(c) addresses the tax qualified status of certain pension "plans" that cover the employees of multiple employers. Section 413 of the Code, however, does not control whether an arrangement is an "employee benefit plan" under ERISA. [Cf. *In re Sewell*, 180 F.3d 707, 711 (5th Cir. 1999) (there is no requirement under ERISA that to be a plan governed by ERISA, a plan must be tax-qualified)]
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> It has been the Department's consistent view that where several unrelated employers merely execute identically worded trust agreements or similar documents as a means to fund or provide benefits, in the absence of any genuine organizational relationship between the employers, no employer group or association exists for purposes of ERISA Section 3(5). Based on our review of the information provided, there is no employment based common nexus or other genuine organizational relationship that is unrelated to the provision of benefits between Advantage or TAG and the employers of employees that benefit from the Plan, or among the different groups of employees that participate in the Plan.

Open MEPs Are Not Single ERISA Plans Even Though the Word "Commonality" Does Not Appear in ERISA. One author noted (correctly) that neither ERISA nor its regulations requires "commonality" and argues that, therefore, the DOL cannot. This argument ignores the fact that both the DOL and the courts have required a preexisting organizational nexus many times during the years. As the Opinion notes, the DOL's precedent is to require a "bona fide group or association of employers," which includes the requirement of a preexisting relationship.

Employer Means the Same Thing for Pension Plans That It Does for Welfare Plans. MEP supporters, in their efforts to distinguish contrary DOL authority, have tried to say there should be a different standard for what constitutes an ERISA Section 3(5) employer when applied to a pension plan and a welfare plan. However, there is no support for that position in case law, ERISA, or DOL opinions. In fact, the DOL has referred to pension opinions to help decide welfare cases, and to welfare opinions to help decide pension cases. The Opinion notes:

> In your submission, you urge that the Department's historical interpretation of "employer" under section 3(5) of ERISA regarding multiple employer welfare arrangements (MEWAs) should be restricted to welfare plans and that a less restrictive interpretation be applied to retirement plans. The Department is of the view, however, that the term "employer" should have the same meaning in this context whether applied to the term welfare plan or pension plan. [*See Sullivan v. Stroop*, 496 U.S. 478, 484 (1990).]

Plan Sponsor

The Opinion concludes that even though the open MEP is not a single plan under ERISA, there is a separate ERISA plan for each employer. The Opinion addresses the identity of the plan sponsor and cites ERISA Section 3(16), which states:

> The term "plan sponsor" means
> (i) the employer in the case of an employee benefit plan established or maintained by a single employer,
> (ii) the employee organization in the case of a plan established or maintained by an employee organization, or
> (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

So, to know who is the plan sponsor (for purposes of ERISA), we must first determine whether the employee benefit plan in question is established by a single employer, or a plan established by an employee organization, or a plan established by more than one employer or employee organization. The Opinion answers that question clearly for an open MEP:

> It is the view of the Department that the Plan does not constitute a single "multiple employer" plan for purposes of ERISA, but rather is an arrangement under which each participating employer establishes and maintains a separate employee benefit plan for the benefit of its own employees.

An open MEP is not a single ERISA plan but instead is a series of separate plans, one for each adopting employer. And those separate plans generally have only one employer. Therefore, ERISA says the plan sponsor of the separate plan is the employer, not whomever the document refers to as the plan sponsor or the lead employer.

For example, consider the "Advantage Plan" discussed in the Opinion. The plan document says that 401(k) Advantage LLC ("Advantage") is the Plan Sponsor. That designation may impart certain duties and authority under tax law or the document, but our concern right now is ERISA. Over 500 unrelated employers "co-sponsor" that plan. Each unrelated employer that is an ERISA employer has established a separate plan under ERISA and is the plan sponsor of that plan.

Apparently, the Advantage Plan is open to union co-sponsorship. A union is an "employee organization" which might well establish a separate plan. So, the employers under the collective bargaining agreement might all be in a single ERISA plan, with the union itself in the role of plan sponsor.

Of course, some of the sponsors might not be capable of sponsoring an ERISA plan. For example, a sole proprietor with no employees could co-sponsor the plan. The sole proprietor is not an employee under ERISA and since there are no employees, the sole proprietor cannot establish an ERISA employee benefit plan. [*See* DOL Reg. § 2510.3-3.]

But by far, the greatest number of co-sponsors are likely to be single employers, who are each the plan sponsor of an ERISA plan, whether they know it or not.

What effect does that have? Over 44 sections of ERISA discuss the plan sponsor, but the effect is varied and depends on plan type and circumstances. If the plan is not a defined benefit plan, many of those sections will not apply. But sponsorship has a profound effect on fiduciary responsibility and on filing Forms 5500 and 8955-SSA.

Page 15 of the 2011 Form 5500 instructions (which apply for both the IRS and the DOL) define plan sponsor in the same way as ERISA itself. The same definition also appears in the 2011 Form 8955-SSA instructions, on page 4.

Fiduciary Responsibilities

The Opinion spends very little time analyzing the effect of separate plan status, but it spends a paragraph discussing the fiduciary issues related to a MEP, thus giving some idea that the DOL considers those issues to be important. The paragraph makes three points:

1. Importantly, we note that persons who operate the arrangement would be subject to the fiduciary provisions of Title I to the extent they have control over plan assets or have discretionary control over the administration or management of the participating employers' separate plans.
2. They would also be subject to the prohibited transaction provisions in ERISA Section 406 to the extent they are "parties in interest" within the meaning of ERISA Section 3(14) either as service providers to the separate employer plans or otherwise.
3. Similarly, each employer sponsor of a plan that participates in the arrangement will be subject to ERISA's fiduciary provisions. [*See* FAB 2002-3 (in selecting a service provider, plan fiduciaries must, consistent with the requirements of ERISA section 404(a), act prudently and solely in the interest of the plan's participants and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable expenses of administering the plan).]

Service Providers as Fiduciaries. The first point deals with plan fiduciaries. Just because an open MEP is not a single ERISA plan, but is rather a series of separate plans, does not mean that ERISA does not apply at all. It does apply. It applies to each separate ERISA plan and to its assets. And, as the Opinion points out, if you have discretionary management and control over an ERISA plan, you are an ERISA fiduciary. Likewise, if you have control over the assets of an ERISA plan (whether or not discretionary), you are an ERISA fiduciary. [*See* ERISA § 3(3).]

For example, consider the context of the Plan discussed in the Opinion. Advantage is the party identified in the document as the Plan Sponsor (but is not the actual ERISA plan sponsor) and as the named fiduciary. Surely, in that role, Advantage is a fiduciary to each of the separate ERISA plans adopted by the underlying employers. That is not a real burden, because that is a role Advantage assumed in the first place.

The Opinion states that TAG Resources is the ERISA Section 3(16) plan administrator. That would be easy to determine because the plan document designates the administrator. Obviously, the plan administrator has discretion over the plan and would be a fiduciary of all the underlying ERISA plans. Again, there is no surprise here. Similarly, if there is an ERISA Section 3(38) investment manager, the manager would be a fiduciary to the underlying plans. There also might be additional fiduciaries who have been engaged by Advantage or TAG. They also would be fiduciaries of the underlying plans.

One such fiduciary would be the trustee of the trust used by a MEP. DOL Reg. Section 2510.3-101 says (in simplified form) that if a plan invests in an unregistered nonoperating investment held at least 25 percent by retirement plans, then the assets of the plan include both the investment in the entity and an investment in the assets the entity holds. Put another way, the entity holds plan assets. We see this most often with common collective trusts and pooled separate accounts, but it also arises with certain hedge funds and other unregistered investments.

If this analysis is correct, then the MEP investment trust is an entity that holds plan assets, and as a result the trustee or others who control the trust are ERISA fiduciaries of all the underlying plans, because they control the assets of those plans. In the rubric of the service provider fee disclosure regulations, they perform "Services provided as a fiduciary to an investment contract, product, or entity that holds plan assets...and in which the covered plan has a direct equity investment." This issue will be significant in connection with Form 5500 filing.

Prohibited Transaction. The second point deals with prohibited transactions. ERISA Section 3(14) defines "parties-in-interest" (the ERISA equivalent of the Code's term "disqualified persons") under the prohibited transaction rules as including both plan fiduciaries and plan service providers. Continuing the example of the Advantage Plan, Advantage and TAG are fiduciaries. They also appear to be service providers. The Opinion says, "Rather than acting in the interest of an employer with respect to the Plan, Advantage and TAG appear to be acting more as service providers to the plan, much like a third party administrator or investment advisor."

This raises one of the most troubling areas of ERISA for many (but not all) open MEPs. The question is, are these fiduciaries engaging in prohibited transactions? A very important issue arising in connection with ERISA is whether the plan fiduciaries (as discussed above) are dealing with plan assets for their own account. [*See* ERISA § 406(b)(1) and Code § 4975(c)(1)(E).]

If a plan fiduciary is effectively able to set its own compensation (directly or through a related party), the arrangement is an act of self-dealing and a prohibited transaction. [*See* Advisory Opinion 93-24A.] The way to address the problem is to have full disclosure and negotiation with an independent plan fiduciary. In other words, the plan administrator, for example, needs to negotiate fees with an independent fiduciary (perhaps whomever the document names as the lead employer).

The Opinion cites FAB 2002-3. The primary issue in that opinion deals with float compensation, but the principles in the bulletin go well beyond it. FAB 2002-3 states:

> In Advisory Opinion 93-24A, the Department expressed the view that a trustee's exercise of discretion to earn income for its own account from the float attributable to outstanding benefit checks constitutes prohibited fiduciary self-dealing under ERISA § 406(b)(1). Advisory Opinion 93-24A dealt with a situation where there was no disclosure of the float to employee benefit plan customers. In a subsequent information letter to the American Bankers Association (August 11, 1994), the Department indicated that "... if a bank fiduciary has openly negotiated with an independent plan fiduciary to retain float attributable to outstanding benefit checks as part of its overall compensation, then the bank's use of the float would not be self-dealing because the bank would not be exercising its fiduciary authority or control for its own benefit. Therefore, to avoid problems, banks should, as part of their fee negotiations, provide full and fair disclosure regarding the use of float on outstanding benefit checks."

In general, the concepts of open negotiation and full and fair disclosure, as used in the 1994 letter, are intended to ensure that service providers provide sufficient information concerning such arrangements so that plan fiduciaries can make informed assessments concerning the prudence of the arrangements. Further, those concepts are intended to ensure that the amount of the service provider's compensation is determined and approved by a fiduciary independent of the service provider so that prohibited self-dealing is avoided.

Note that there is an exemption in ERISA Section 408(b)(2) for reasonable compensation paid to a service provider under a reasonable contract for services the plan needs. But as the regulations under that section point out, the exemption does not apply to the ERISA Section 406(b)(1) prohibition against fiduciary self-dealing. In other words, it is not enough that a fiduciary's contract and compensation are reasonable. If the fiduciary, directly or indirectly, has the power to set his or her compensation, then the contract must also be negotiated in good faith, after full and fair disclosure, with an independent fiduciary.

So, if the "Plan Sponsor" named in the document is approving the compensation of the Plan Administrator, and the two parties are affiliates, or their independence is otherwise compromised, the arrangement with the administrator is a prohibited transaction, whether or not it is reasonable.

Some MEPs take a different approach, and say that the independent fiduciary approving the compensation is each individual employer co-sponsoring the plan. That argument seems stretched. Realistically, if I am one of 500 employers co-sponsoring a MEP, I have no ability to adjust the fee arrangements of the key operators of the MEP. I either choose to put my employees' funds there, with whatever fees exist, or I choose to take their money elsewhere. There is no "open negotiation" at that level, even if there is full disclosure.

Sponsor Fiduciary Duties. This leads to the Opinion's third point on fiduciary duties. The Opinion states that the true ERISA plan sponsor (generally an individual employer with employees participating in the plan) is also an ERISA fiduciary. It says so very clearly, without equivocation. What fiduciary duties does the sponsor have? It must make that key decision, "Shall I put my employees' funds here?" which flows from ERISA's requirements of prudence and loyalty to participants and beneficiaries.

This becomes a critical decision in a MEP because it is the only decision the sponsor can make, and the choice is "take it or leave it." If you like the plan and the arrangements, but you don't trust the fiduciary or believe the fiduciary is paid too much, then you need to look elsewhere. This is not a one-time decision, because the employer's responsibility includes the duty to monitor the plan on an ongoing basis.

FAB 2002-3 further states:

> In carrying out these responsibilities, the Department has indicated that a plan fiduciary must engage in an objective process designed to elicit information necessary to assess the qualifications of the provider, the quality of services offered, and the reasonableness of the fees charged in light of the services provided. In addition, such process should be designed to avoid self-dealing, conflicts of interest or other improper influence.

The Opinion refers to this duty in connection with an employer, acting as a fiduciary, trying to decide whether to entrust the employees' money to a given group of fiduciaries and other service providers in exchange for a given set of services. And as with any other judgment, while ERISA does not expect perfection, it does expect diligence in pursuing an objective, deliberative process. What should the employer be looking for?

- High on the list has to be avoidance of prohibited transactions. That is the whole idea of a process "designed to avoid self-dealing, conflicts of interest or other improper influence." In other words, if the employer negligently entrusts the employees' money to individuals that, based on the objective facts, are engaging in prohibited transactions, as described above, the employer could be held to account.
- Reasonableness of fees is another key issue. How much is everyone involved in the plan getting and who is paying it? Are there better deals available for the employees? It would not be inappropriate for the employer to request the service provider fee disclosures for the key fiduciaries and other providers serving the plan so that the employer can better assess all the fees and any underlying conflicts of interest.
- The employer must also evaluate "qualifications" and "quality." Obviously, this deals with the structure of the MEP, the services to be provided, the availability of investment education or advice in a participant, directed plan, the caliber of the investment options selected for participants (or of the manager doing the selecting), and a host of other issues.

Open MEPs operate in a very competitive market. They compete with each other and with other retirement plan arrangements and service providers. The DOL has put employers on notice that the decision to participate in a particular open MEP, rather than use an alternative MEP or an alternative arrangement, is a fiduciary decision.

PEO MEPs

The "Opinion" arose in the context of an open MEP, but the principles underlying the Opinion apply to any MEP. They are principles the DOL has referenced repeatedly throughout the years.

Perhaps the best way to illustrate that point is to look at another advisory opinion the DOL issued the same day. Advisory Opinion 2012-03A dealt with a totally different situation than an open MEP. A company wanted to start a multiple employer plan that would receive transfers of assets from abandoned plans. The DOL used the same set of factors and the exact same reasoning as in the Opinion on open MEPs to hold that the proposed plan would be a series of separate ERISA plans.

The Opinion cites Advisory Opinion 95-29A, which was directed to a staffing firm, or professional employer organization (PEO), for its welfare plan. The PEO adopted the plan for its worksite employees, the employees it was "leasing" out to its clients. The PEO took the position that it was the "co-employer" of these employees, and therefore, the plan was a single plan under ERISA. The DOL's ruling is subtle:

> It is the position of the Department of Labor . . . that ESA is acting either directly or indirectly in the interest of an "employer" in establishing and maintaining the ESA Program, which therefore is one or more employee welfare benefit plans within the meaning of section 3(1) of Title I of ERISA.

The DOL thus ruled that the plan is *at least* one ERISA plan, but it may be more than one.

Reading on, the key issue in Advisory Opinion 95-29A was whether the PEO was the common law employer of the workers. If it was, then it was directly setting up a plan for its employees, and the plan would logically be a single ERISA plan. If the PEO was not the common law employer, then it was indirectly setting up a plan on behalf of the true employer, one of the clients of the staffing firm. ERISA Section 3(5) allows this, but each of the underlying employers would thereby be (indirectly) establishing a separate plan.

Even though the plan might be a single ERISA plan, that would not necessarily keep it from being a multiple employer welfare arrangement (MEWA) under ERISA Section 3(40), and therefore subject to state insurance regulation. The DOL ruled that the PEO's plan was a MEWA unless the PEO could demonstrate that it truly was the employer. The DOL found nothing in the PEO's paperwork to support the conclusion that the PEO was the employer.

The author's book, *Who's the Employer: A Guide to Employee and Aggregation Issues Affecting Qualified Plans* (6th edition, 2012), addresses PEOs at length in Chapters 5 and 6. The book concludes that in almost every situation involving a staffing firm and long-term worksite employees, the firm is not the true employer. Rather, the firm's client, the business for whom the employees are providing services, is the employer. The staffing firm would be the employer of its "back office" staff as well as true temporary workers, who work with a given firm for very short periods and then move on.

Of course, in the modern PEO multiple employer retirement plan, the MEP is co-sponsored by the client employers. The IRS insisted on that in Rev. Proc. 2002-21. So the question of whether the PEO can indirectly set up the plan for its clients does not arise. However, based on the reasoning of the new Opinion (2012-04A) and the earlier Advisory Opinion 95-29A, a PEO MEP would be a single plan only if either:

1. The PEO was the common law employer (exceedingly rare), or
2. The client employers are a "bona fide group or association of employers," as discussed above.

The analysis does not favor PEO plans. There is no preexisting business relationship between the employers, other than that they share a service provider. There is no real "association" and no real purposes to the collected group of clients, other than efficiently running their businesses. The PEO clients overall have very little to do with the operation of the PEO's plan. Their only remedy if they are dissatisfied is to discontinue their relationship with the PEO and withdraw from the plan (if the plan allows for withdrawal).

This analysis leads to the conclusion that the typical PEO plan is not a single ERISA plan, but is, like open MEPs, a series of separate plans under ERISA. PEOs and other staffing firms would do well to have experienced ERISA counsel review their retirement plan arrangements in light of the Opinion.

Other Kinds of MEPs

The Opinion discussed some other types of plans involving more than one employer, and the principles applied to analyze any such plan.

Controlled groups. The DOL absolutely treats a controlled group plan as a single ERISA plan. The Opinion cites Advisory Opinion 89-06A to that effect. There is every reason to suppose the DOL would apply the same reasoning to groups under common control and to affiliated service groups.

Shared employees. A shared employee situation arises when an employee works for several unrelated companies at the same time. A good example would be the receptionist working for a suite of doctors, each of whom has a separate practice. If the doctors choose to set up a MEP, the doctors would control the arrangement and their rental accommodations give them a preexisting business nexus independent of the plan. There is little doubt that this would be a single ERISA plan.

"Kissing cousins." This is a catch-all category that includes overlapping ownership (but not enough to constitute a controlled group), business relationships, etc. It also includes the situation in which a controlled group jointly sponsors a plan, but then a change in ownership breaks up the controlled group. As discussed in the prior JPB article, there have been several opinion letters where the DOL ruled that a group of businesses had sufficient connection and control to have a single ERISA plan, but this area is heavily fact-dependent. The Opinion differentiates this type of plan from an open MEP:

> This letter also does not address the circumstance where an employee pension plan is maintained by more than one employer as a result of a corporate merger, acquisition or divestiture transaction or other circumstance that involves a substantial economic, business, or representational purpose unrelated to provision of benefits to the employees of separate employers.

Trade association MEPs. As the prior JPB article demonstrates, it has long been settled, at least as far as the DOL is concerned, that if a trade association open to all who practice a given profession offers a plan to all its members, this creates a series of separate plans, rather than a single ERISA plan. The DOL first ruled in this arena three decades ago and has yet to vary from that stance.

Working Without a Net

Thus far, this article has addressed those issues the Opinion raises. In some cases, the article has gone beyond the Opinion, but the territory is ground the Opinion covers to a greater or lesser degree.

There are many issues, which flow from the assumption that a given MEP is a series of separate ERISA plans, which the Opinion did not address. In that respect, the Opinion is much like the controlled group rules.

The controlled group rules of Code Section 414(b) do not tell you whether you need to cover employees of controlled group members. They do not say whether group members have a single 415 limit. They do not talk about top-heavy testing, ADP testing, counting service, determining compensation, or a host of other issues.

The controlled group rules essentially do one thing. They say that for many Code provisions, the members of the controlled group are deemed to be a single employer. It is up to us, then, to look at that principle and see how it applies in the context of all those other Code rules. We take a given conclusion (single employer status) and then apply general plan rules to make our determinations.

This is what we have here with the Opinion. The DOL was asked a question: Are open MEPs, in general (represented here by a specific open MEP), single ERISA plans? It was a very good question. It was the right question to ask. And the DOL answered that question. It was exactly and precisely the answer open MEP supporters did not want to hear.

Why? Why does it matter that open MEPs are not single ERISA plans but rather a series of separate plans? It matters because ERISA rules and form instructions (general plan rules) dictate certain consequences as a result of that conclusion. And frequently, those consequences will make open MEPs more expensive to operate than they have been until now. Those expenses will be paid by employers participating in the MEP, will be paid (directly or indirectly) from participant accounts, or will eat into the profit margins of the MEP operators. Ultimately, open MEPs have lost a competitive advantage they previously claimed. While the following discussion addresses open MEPs, it applies with equal force to other MEP designs, which are multiple ERISA plans, unless the context requires otherwise.

Form 5500 Filing Requirements

Little about Opinion 2012-04A is more universally agreed than the fact that, by declaring the underlying employers to have each established separate ERISA plans, the DOL effectively decreed that each of those plans must file a separate 5500-series form. While the Opinion never discusses Form 5500, earlier DOL opinions have. In Advisory Opinion 81-47A, the DOL stated that if a MEP consisted of separate ERISA plans:

> …each such plan must comply with the reporting and disclosure requirement of Part I of ERISA that are applicable to it. On the other hand, if one multiple employer plan can be recognized in this case, the designated administrator of the plan would be the proper person or entity to file that plan's annual report.

The following is an approach to 5500 filing. There may be other workable approaches.

First year. What is the first year to which the multiple plan/multiple filing requirement applies? Technically, it has always been there. In other words, if an open MEP was established in 2006, then the underlying ERISA plans (generally one for each employer) should have filed a 5500-series form for 2006, 2007, 2008, 2009, and 2010. Of course, with no filing, there is no statute of limitations for the 5500, and in theory the DOL could assert late-filing penalties for each of those years.

The author doubts the DOL will take this approach as an enforcement matter. At the Benefits Conference of the South, Scott Albert, head of the Division of Reporting and Compliance for EBSA's Office of the Chief Accountant, said, in essence, that the DOL would likely view the individual employers as innocent parties and not pursue them for late filing penalties or to request the unfiled returns.

While that is by no means an official position, it is an entirely reasonable position. Even if the DOL were to pursue the unfiled returns, surely they would give the employers the opportunity to use the delinquent filer program. It is inconceivable that the DOL would simply "lower the boom" on them. As a result, there is really little or no reason to file the prior returns unless and until the DOL demands them.

What about 2011? Is there any chance the DOL will say "Since the ruling came out so close to the filing deadline, we'll give you a pass on 2011 as well?" There is a chance but it seems very unlikely. More to the point, if the DOL does not make such a statement, they would be very well within their rights to pursue each individual employer for the unfiled return plus penalties. In other words, the employers (or, more likely, the MEP organizers facing disgruntled employers) can ill afford the risk of not filing the 2011 returns (on time or with extension), unless the DOL makes an affirmative statement allowing consolidated filing.

Filing for the MEP Itself. Does the MEP itself need to file anything? Here we find one of our first dilemmas. The Opinion says the MEP is a series of separate plans for purposes of ERISA, but Code Section 413(c) says it is one plan for qualification purposes. Code Section 6058 demands that the one plan file a 5500-series form. So if the DOL doesn't require that the MEP itself file a return, the IRS might. Unfortunately, we won't know one way or the other on this issue until one of the agencies speaks.

Of course, there is always the issue that the 2010 MEP return was not a final return. Without filing a final return, there is no graceful way to avoid delinquency letters from the agencies.

The following approach might handle both concerns and make filing much easier for underlying large plans. As discussed above, it is arguable that for DOL purposes the MEP, while not a plan itself, is an investment entity that holds plan assets, as defined in DOL Reg. Section 2510.3-101. If so, then while it need not file Form 5500, it is eligible to do so as a Direct Filing Entity ("DFE"). Specifically, the MEP would be a "103-12 IE."

A 103-12 IE that chooses to file Form 5500 follows specific instructions detailed on page 11 of the 2011 Form 5500 instructions. As such, the MEP would include Schedules A, C, G (if relevant), and H, and an audit. The MEP also would file Schedule D, Part II, to list the separate plans that are part of the MEP. It also might need to complete Part I if the MEP invests in other DFEs, such as pooled separate accounts.

When completing Schedule H, the DFE reports contributions as asset transfers in on line 2l(1), and distributions as asset transfers out on line 2l(2).

There are a few questions a 103-12 IE does not answer, which would nonetheless be relevant for the IRS, such as the participant count (lines 5 and 6) and type of plan information and codes (line 8). The plan could append an "Other Attachment" explaining its status as an open MEP and providing the information from those lines.

Employer Plan Filing—Large or Small. Now turn to the individual ERISA plans which make up the MEP. Each plan has a separate 5500 obligation. Consider a single employer that, according to the Opinion, is maintaining a separate ERISA plan. As a preliminary question, we must determine whether this employer is maintaining a large plan or a small plan. This will be based on the number of employees of that employer who participate in the plan on the first day of the plan year (line 5 of the return). If at least 100 employees participate, it is a large plan.

What about the 80/120 rule? That rule allows a plan with fewer than 121 participants to continue filing as a small plan so long as it filed as a small plan the prior year. If the plan did not file last year (and the individual plans did not file for 2010), then the plan cannot use the 80/120 rule. If the plan had 95 participants on January 1, 2010, and 105 on January 1, 2011, for example, the plan might find it advisable to file for both years (paying the $750 late filing penalty for 2010).

Employer Plan Filing—Large Plan. A large plan must file Form 5500 with Schedule H and an audit. However, those requirements are simplified to the extent the plan invests in a DFE (such as a 103-12 IE like the MEP), and the DFE files Form 5500. Audits are discussed below.

- Schedule A. If the MEP files a Schedule A to report an insurance contract the MEP holds, the underlying plan does not need to file a Schedule A to report it again.
- Schedule C. If the MEP reports a service provider on Schedule C, the underlying plan does not need to report the provider. This may eliminate Schedule C filing altogether by the underlying plans.
- Schedule D. The underlying plan reports the MEP as a 103-12 IE on Part 1 of Schedule D.
- Schedule H. The underlying plan reports the investment in the MEP on line 1c (12). Because the MEP filed as a DFE, the plan need not break down its investment into subcategories. In addition to the investment in the DFE, the plan might need to report participant loans or contributions receivable. The plan's share of the MEP's income, including unrealized gains or losses, would be reported on line 2b(9).
- Schedule R. Because a DFE need not file Schedule R, the underlying plan must, unless an exception applies. A profit-sharing or stock bonus plan (including a 401(k) plan) need not file Schedule R if there were no distributions.

Employer Plan Filing—Small Plan. For a small plan, the question is whether the plan is eligible to file Form 5500-SF. Typically, the plan will meet most of the requirements. It will not include employer securities, it is not a multiemployer plan, and it will qualify for the small plan audit exemption. The only remaining requirement is that 100 percent of the plan assets consist of eligible plan assets.

In one sense, the assets of the employer's plan consist of an interest in the MEP trust, which would not be an eligible plan asset. But DOL Reg. Section 2520.103-12 (the section that gives 103-12 IE's their curious name) says the plan has an election regarding how it treats a DFE and its assets. In other words, the plan can choose to disregard the DFE, and instead treat the plan as owning a pro rata portion of the underlying assets. Those underlying assets generally would be eligible plan assets. In other words, while the large plan embraces the DFE concept to simplify reporting, the small plan welcomes the "look-through" approach and disregards the DFE, also to achieve simplicity.

Owner-Only Plan Filing. Previously, this article addressed the possibility that a business with no employees, such as a sole proprietor working on his or her own, might choose to participate in an open MEP. Such an employer is exempt from filing (and indeed cannot file) Form 5500, but generally will file Form 5500-EZ or 5500-SF. However, because the IRS views the MEP itself as the plan, and an owner-only plan is not subject to ERISA's reporting and disclosure obligations, it is possible that the plan need not file anything at all.

Specific Lines. Consider answers to some specific questions for the underlying plans. Assume 500 employers are co-sponsoring a MEP, and none of the 500 employers has ever filed a return for the MEP before.

- Preliminary information. Each plan would check that it is a single-employer plan and that this is the first return/report.
- Line 1. This is the name of the plan that appears on the plan document. The 500 employers will all show the same plan name. The plan number might differ among those 500 employers, depending on other plans that employer has adopted. The effective date is the date the plan was effective for that employer.
- Line 2. As discussed earlier, in the case of a single employer ERISA plan, the plan sponsor is the adopting employer. So each of the 500 employers will enter its own name and identifying information on line 2.
- Line 3. The plan document names the plan administrator, usually one of the MEP organizers. All 500 employers would enter the name of the plan administrator designated in the document.
- Line 4. Leave it blank. None of the 500 plans has previously filed a return so there is no information to change.
- Lines 5 and 6. Enter the employees of the plan sponsor who are participants.
- Line 8. Enter the codes that apply to the employer. Since different employers may be allowed to elect different features, these codes may differ from employer to employer.
- Signature. The plan administrator must sign the return. If the employer wishes to sign as well, as the plan sponsor, it can do so.

IRS Audits. Of course, separate filings means the likelihood of an IRS audit is much greater. According to the 2010 IRS Data Book, the IRS audited roughly one percent of Forms 5500 filed for 2008. So, for an individual plan, the odds of escaping an IRS audit for a given year are essentially 99 percent. However, the likelihood that at least one of the 500 Forms 5500 from the MEP being selected for audit in a given year approaches certainty: 99.3 percent. In other words, the odds that none of the Forms will be selected for audit for a plan year is 0.7 percent. Because the MEP is a single plan from the IRS standpoint, to subject one employer's return to an IRS audit potentially subjects the entire MEP to an audit.

To MEP organizers, the message should be clear: Not only is the DOL watching for fiduciary and prohibited transaction issues, but in addition, the IRS will be able to monitor qualification issues with greater frequency than it ever has before.

Form 8955-SSA

The separate ERISA plans apparently each must file a separate Form 8955-SSA to report separated participants with deferred vested benefits. This is counter-intuitive. Form 8955-SSA is a Code requirement (*see* Code Section 6057) and, therefore, the Code definition of a plan (Code Section 414(l)) would prevail. Because the Code treats a MEP as a single plan, there would be only one Form 8955-SSA filed. That is indeed how it would work for Form 5500 were it not for ERISA (and why the MEP itself must continue to file for Code purposes).

However, Code Section 6057(a)(1) compels retirement plans subject to ERISA's vesting requirements to file an SSA. While the MEP as a whole must comply with the vesting standards of Code Section 411 (as modified by Code Section 413(c)), the Opinion effectively clarifies that it is the individual employer plan that is subject to ERISA's vesting provisions, because it is the only plan ERISA recognizes. Thus, each separate underlying plan, for each separate sponsor, must file a separate SSA for its employees.

In many respects, that seems a burdensome result, but there is no other way to interpret the legal requirements. Perhaps the IRS will interpret the rules differently, or provide administrative relief to authorize a combined SSA for the MEP. But, unless the IRS does so, each adopting employer of an underlying ERISA plan must file an SSA if applicable, or the employer or plan administrator becomes subject to a penalty of $1/participant/day for late filing or nonfiling, up to a maximum of $5,000/year.

From a policy standpoint, this may be the correct result. Ultimately, the MEP represents a mechanism to deliver a bundle of services and investment options to a plan. As with other service providers, employers move from one vendor to another. They might switch to another MEP, or move to a separate plan. As a result, the logical party for a retired former participant to contact to ask about his or her benefit is not the MEP provider, but the employer.

There is a certain symmetry in this result. Each underlying plan files a Form 5500. Each underlying plan files an SSA. The plan administrator (as named in the plan document, likely one of the MEP organizers) can file an extension request (Form 5558) for both. The identifying information (lines 1, 2, and 3) is the same for both. The administrator must sign both forms. According to the SSA instructions, because the plan sponsor of the underlying plan (the employer) is different from the plan administrator, the plan sponsor must also sign the SSA.

Ideally, the switch to separate reporting would be accompanied by a final 8955-SSA for the MEP as a whole. The MEP would show each person it had previously reported as a category D (the MEP is not responsible for payment). The individual employer form would report each former participant with a remaining account balance as category C, showing a transfer from the MEP.

Audits

The Opinion effectively subjects each employer's underlying plan separately to ERISA's audit requirements. The way those audit requirements apply is determined at the individual ERISA plan level, not at the MEP level.

The DOL settled this point nearly 30 years ago in Advisory Opinion 83-21A, ruling that a United Way and certain "affiliated agencies" had established separate ERISA plans. The DOL ruled that an insufficient "organizational nexus" appeared between the plan sponsors for it to be a single ERISA plan. At the time, there was no requirement for small plans (under 100 participants) to be audited, under any circumstances. The DOL determined that because no employer sponsoring the MEP had at least 100 participants, there was no audit requirement for the MEP. In other words, the 100-participant threshold is applied at the level of the employer.

DFE Filing. Here is where the decision to have the MEP itself file as a direct filing entity shines. If it chooses to file as a 103-12 IE, the filing must be audited by an independent qualified public accountant. [*See* DOL Reg. § 2520.103-12(b)(2) and Form 5500 instructions.]

Large Employer Plan Filing. When an employer with more than 99 participants adopts a MEP, the Form 5500 for that employer is subject to the audit requirements. So, every large underlying plan must be audited. But DOL Reg. Section 2520.103-12(d) states that the plan audits "need not extend to any information concerning an entity which is reported directly to" the DOL as a 103-12 IE. In other words, for this situation, the individual plan audit does not have to include anything addressed in the MEP audit. This should vastly simplify, and hopefully reduce the costs of, the audits for the large plans.

There are still things to include in the audits for the underlying large plans. For example, auditors are instructed to look specifically at the answer to question 4a on Schedule H, asking whether the employer was late in depositing deferrals. That answer applies at the individual employer level. The reporting of deemed distributions of participant loans (and thus the loans themselves) would also be handled at the level of the underlying plan.

Small Plan Filing. Plans with fewer than 100 participants are exempt from the audit requirements if at least 95 percent of the plan assets are "qualifying" or there is a bond in at least the amount of the nonqualifying assets. Frequently, there must be an enhanced summary annual report and additional information must be available at participant request. [*See* 2011 Form 5500 Instructions, pages 48 and 49.]

One type of qualifying asset for a defined contribution plan is an asset held in a participant-directed account for which the participant receives a statement from a regulated financial institution at least annually. Participant loans satisfying the prohibited transaction exemption requirements are also qualifying. That describes most of the assets in most open MEPs. The advantage to having all plan assets fall under those categories is that there is no need for an enhanced summary annual report.

For the situations in which the MEP holds other assets, the underlying small plans will need to comply with the enhanced summary annual report and information availability requirements.

Fidelity Bond

ERISA Section 412 requires that plan officials who handle ERISA plan funds be covered by a fidelity bond. The amount of the bond is 10 percent of the funds or other plan assets handled, up to a maximum of $500,000 (or $1,000,000 if the plan holds employer securities). Certain regulated financial institutions need not be bonded, but it is unlikely that all organizations that handle MEP funds (e.g., the plan administrator) are regulated financial institutions.

The question for an open MEP is whether the $500,000 applies to the MEP as a whole, or whether it is determined separately for each underlying ERISA plan. The answer is not readily apparent from the statute itself, but fortunately the DOL issued an extensive (and largely overlooked) series of Q&As on bonding questions in 2008 in FAB 2008-04, which answers the question quite clearly.

Q&A 23 states that the bond can insure more than one plan. Q&A 10 allows a service provider to purchase a bond to satisfy the requirements and does not require that the individual ERISA plan pay for the cost. However, Q&A 11 allows the plan to pay the costs.

Q&As 23 and 24 make it clear that where multiple plans are involved, the amount of the bond must be at least equal to the sum of amounts each plan must obtain.

Q-23: Can a bond insure more than one plan?

> Yes. ERISA does not prohibit more than one plan from being named as an insured under the same bond. Any such bond must, however, allow for a recovery by each plan in an amount at least equal to that which would have been required for each plan under separate bonds. Thus, if a person covered under a bond has handling functions in more than one plan insured under that bond, the amount of the bond must be sufficient to cover such person for at least ten percent of the total amount that person handles in all the plans insured under the bond, up to the maximum required amount for each plan. [Citations omitted.]
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> Example: X is the administrator of two welfare plans run by the same employer and he "handled" $100,000 in the preceding reporting year for Plan A and $500,000 for Plan B. If both plans are insured under the same bond, the amount of the bond with respect to X must be at least $60,000, or ten percent of the total funds handled by X for both plans insured under the bond ($10,000 for Plan A plus $50,000 for Plan B).
>
> Example: Y is covered under a bond that insures two separate plans, Plan A and Plan B. Both plans hold employer securities. Y handles $12,000,000 in funds for Plan A and $400,000 for Plan B. Accordingly, Plan A must be able to recover under the bond up to a maximum of $1,000,000 for losses caused by Y, and Plan B must be able to recover under the bond up to a maximum of $40,000 for losses caused by Y.

Q-24: If the bond insures more than one plan, can a claim by one plan reduce the amount of coverage available to other plans insured on the bond?

> No. As noted above, when a bond insures more than one plan, the bond's limit of liability must be sufficient to insure each plan as though such plan were bonded separately. 29 C.F.R. § 2580.412-16(c). Further, in order to meet the requirement that each plan insured on a multi-plan bond be protected, the bonding arrangement must ensure that payment of a loss sustained by one plan will not reduce the amount of required coverage available to other plans insured under the bond. This can be achieved either by the terms of the bond or rider to the bond, or by separate agreement among the parties concerned that payment of a loss sustained by one of the insureds shall not work to the detriment of any other plan insured under the bond with respect to the amount for which that plan is required to be insured. 29 C.F.R. § 2580.412-16(d), § 2580.412-18.

Put this in the context of an open MEP. Suppose the MEP consists of 500 separate plans for purposes of ERISA. One hundred of these plans each have more than $5,000,000 in assets. The remaining 400 plans average $3,000,000 in assets each. Following the logic from the examples in Q&A 23, that means the fidelity bond covering those who handle the assets of the MEP must be at least $170,000,000 (400 x 10 percent x $3,000,000 + 100 x $500,000). Each of the 100 large plans must have at least $500,000 of coverage, regardless of claims by any other plan. Each of the other 400 plans must have coverage of at least 10 percent of assets, regardless of claims by any other plan. The easiest way to handle this is to procure a separate bond for each underlying plan.

How soon must the plan officials obtain the bond? The answer, of course, is "immediately." The Opinion did not set forth new law. The Opinion applied existing precedents and law to a particular situation. Open MEPs didn't become a series of separate plans in the middle of 2012. They always have been a series of separate plans if you follow the DOL's reasoning. The bond for 2012 should have been in place long before now, and the sooner it is obtained, the better.

Trust Issues

One of the thorniest issues surrounding the Opinion deals with the trust holding MEP assets. It is possible that ERISA fiduciary rules prohibit the trust from qualifying as part of a single plan for Code purposes.

Risk pooling. The prior JPB article introduced the concept of risk-pooling. In order for a MEP to be a single plan under Code Section 413(c), it must be a single plan under Code Section 414(l). To meet that standard, all plan assets must be available on an ongoing basis to pay all plan participants and beneficiaries. If the funds of company X are limited to paying the employees of X, then there is a separate plan for Code purposes for X, regardless of what the plan document might otherwise provide. The Advantage plan mentioned in the Opinion is a single plan for Code purposes only if the funds each employer contributes are available to pay benefits to the participants and beneficiaries of all 500+ co-sponsoring employers.

But for an open MEP, this requirement runs headlong into the exclusive purpose rule of ERISA Section 404(a). ERISA fiduciaries are to discharge their responsibilities "for the exclusive purpose of providing benefits to participants and their beneficiaries; and defraying reasonable expenses of administering the plan." [*Also see* ERISA § 403(c)(1).]

Consider this rule in the context of the Opinion, which treats each employer as having established a separate ERISA plan, and treats the employer as making a fiduciary decision in entering into the MEP arrangement. The MEP trust expressly does *not* limit the assets of each ERISA plan to the payment of benefits of the participants and beneficiaries of that plan, because to do so would mean there are separate plans for Code purposes. On its face, this appears to be a violation of ERISA's exclusive purpose rule and potentially a prohibited transaction under ERISA Section 406(b)(2).

Code disadvantages. There seems to be only one way to resolve this tension, and that is to break up the Code MEP. Erect a "Chinese wall" to restrict the assets of each ERISA plan to the payment of benefits for the participants in that plan and sacrifice single plan status for tax purposes.

Or is it really a sacrifice? Arguably, there is little positive that comes from having a single plan for Code purposes. In fact, there are many things the plans gain by putting away the MEP façade. If each employer has adopted a separate plan under the Code, as well as under ERISA, then:

- There is no difference in coverage, nondiscrimination, or top-heavy testing because that is already performed separately for each adopting employer.
- Each plan stands or falls separately. The failure of one employer to satisfy coverage, nondiscrimination, or top-heavy has no adverse effect on any other employer. The "bad apple" rule disappears.
- If the IRS audits one employer's Form 5500, it has no effect on any other employers.
- Each employer will credit its own service and need not consider the service a worker provides to any other co-sponsor. This vastly simplifies eligibility and vesting and makes the plan potentially more affordable.
- Participants who work for more than one unrelated employer in a limitation year can have separate 415 limits.

Perhaps the only thing the arrangement loses by abandoning the risk-pooling clause is the ready ability to use a single document. However, with the ability of a document sponsor to amend prototype or volume submitter plans, the only real loss in dealing with separate documents is having to go to each employer to sign the restatement every six years.

Asset pool. One of the advantages of a MEP is that there is a single pool of assets to invest. Potentially, this allows the advisors in charge of the plan's investments to assemble a stronger investment line-up with lower fees than would be available to the plans if they were separate. The arrangement need not sacrifice this benefit by using separate plans for each employer.

Rev. Rul. 81-100, as modified by Rev. Rul. 2004-67 and Rev. Rul. 2011-1, allows multiple plans to pool their resources into a group trust. The trust is exempt from tax and, if it files Form 5500, would qualify as a 103-12 IE, allowing for the simplified filing and audit potential discussed earlier. Rev. Proc. 2011-1 requires the group trust to avoid the risk-pooling concept, mandating:

> The group trust instrument expressly prohibits any part of its corpus or income that equitably belongs to any

> adopting group trust retiree benefit plan from being used for, or diverted to, any purpose other than for the exclusive benefit of the participants and the beneficiaries of the group trust retiree benefit plan. For example, plan assets are treated as used for, or diverted to, a purpose other than for the exclusive benefit of the plan participants or beneficiaries if the assets of one group trust retiree benefit plan are used to provide benefits under another group trust retiree benefit plan even if the plan participant or beneficiary receiving the benefits is a participant or beneficiary under both plans.

Use of the group trust arrangement is also available for 403(b) plans investing in mutual funds. This provides a simple mechanism for 403(b) plans to avail themselves of the asset benefits of a MEP without having to take the risks associated with the lack of multiple employer provisions in Code Section 403(b) or its regulations.

Group trusts involve both securities and tax laws. It is important for an advisor considering the establishment of a group trust to consult with experienced securities counsel as well as to file a request for a determination letter for the group trust, using IRS Form 5316.

Payment of expenses. Separating the arrangement into separate plans avoids another potential ERISA problem relating to ERISA's exclusive purpose rule. That rule limits fiduciaries to providing benefits to plan participants and beneficiaries and "defraying reasonable expenses of administering the plan."

One concern about a MEP, particularly one with revenue sharing, is that revenue from assets generated by the separate plan for employer A may be used to pay the expenses of the separate plan for employer B. For example, suppose plan A has 50 participants and plan B has 150. A and B form a MEP, which is treated as separate plans under ERISA, but administered as though it were a single pool of money. Revenue sharing from that pool is used to pay for the audit relating to employer B. Effectively, the employees in A are subsidizing the employees in B.

The DOL specifically addressed the issue in an information letter dated October 16, 1986, dealing with directed commission arrangements. They said:

> An investment manager's use of one plan's assets to benefit another plan would contravene the exclusive purpose requirements of sections 403(c)(1) and 404(a)(1) of ERISA. Issues are also raised under section 406(b)(2) where a fiduciary allocates commission credits among unrelated plans in a manner which does not reflect the actual commissions generated by each such plan. In this respect, we note that an investment manager would not avoid engaging in violations of the fiduciary responsibility provisions of ERISA merely because, within some undefined period of time, each plan participating in the arrangement may receive commission credits which reflect the commissions actually generated by the plan.

Of course, separating the underlying plans is not the only way to avoid cross-payment of plan expenses, but it does work quite efficiently to that end.

Third Party Management

Perhaps the greatest advantage to a MEP is the availability of third party management. The employer is not acting as the plan administrator, trustee, or investment manager. These duties are entrusted to others, who hopefully know what they are doing.

Not everyone needs third party providers for those services, just as not everyone needs to have a mechanic perform an oil change; some can do this themselves. But for those who desire or need the assistance, it can be invaluable. Of course, that assistance comes at price, but so does the assistance of any other third party dealing with the plan. The employer can prepare its own Form 5500, but it is often more cost-effective to engage a knowledgeable third party to do so.

Separating the MEP into separate plans ultimately should do little to change this portion of the model. Those providers who have expertise and desire to offer these third party services to plan sponsors should be able to continue to do so even after the Opinion. The Opinion adds clarity to the arrangement, by demanding that the service providers comply with ERISA's fiduciary guidelines, and reminding employers that they have fiduciary responsibilities as well, even though they are delegating many of the plan's duties.

Conclusion

Advisory Opinion 2012-04A puts "open MEPs" on an equal footing with other plan service models, by taking away artificial cost savings MEP organizers have claimed, such as filing a single Form 5500 with a single audit. While it has not "killed" open MEPs, per se, the Opinion effectively mandates serious reconsideration of MEP design and operation. Time will tell the ultimate effect of the ruling on the marketplace. ■