

COMMENT LETTER

October 29, 2019

ICI Comment Letter to DOL Responding to Request for Information on Open MEPs (pdf)

Filed Electronically October 29, 2019 Office of Regulations and Interpretations Employee Benefits Security Administration Room N-5655 US Department of Labor 200 Constitution Ave., NW Washington, DC 20210 Re: RIN 1210-AB92; “Open MEPs” and Other Issues Under Section 3(5) of ERISA Dear Sir or Madam: We Investment Company Institute¹ is pleased to submit comments on the Department of Labor’s (the Department’s) Request for Information (RFI) on open multiple employer plans (MEPs). We RFI seeks comments on whether the Department should amend its regulations to facilitate the sponsorship of open MEPs by persons (such as financial services firms) acting indirectly in the interests of unrelated employers. We Institute supports expanding access to MEPs, particularly for small employers. As we have previously recommended,² we urge the Department to permit unrelated employers to participate in open MEPs sponsored by financial services firms. Financial services firms have valuable expertise, necessary infrastructure, and other known capabilities relevant to MEP sponsorship and their involvement is crucial to ensure a robust competitive marketplace for MEPs. 1 We Investment Company Institute (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI’s members manage total assets of US\$23.4 trillion in the United States, serving more than 100 million US shareholders, and US\$7.1 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC. 2 See ICI Letter to the Department of Labor, December 21, 2018, available at <https://www.ici.org/pdf/31534a.pdf> (“2018 Letter”). US Department of Labor October 29, 2019 Page 2 of 14 As explained below, expanding access to MEPs has the potential to significantly increase retirement plan coverage and retirement savings adequacy. We Department’s recently finalized regulation on association retirement plans and other MEPs (the “MEP regulation”),³ however, is too limited to have a meaningful impact on coverage. We are pleased that the RFI, issued in conjunction with the final MEP regulation, seeks additional views on how best to expand MEPs beyond employer associations and professional employer organizations (PEOs). In this letter, we reiterate and expand on our 2018 Letter provided in response to the Department’s proposed MEP regulation. We urge the Department to interpret the definition of “employer” under section 3(5) of ERISA more broadly, specifically by expanding the category of persons able to act indirectly in the

interest of employers in sponsoring a plan. Such an interpretation would be within the Department's statutory authority and would be consistent with the Department's interpretations with respect to PEO- and state-sponsored MEPs. Financial services firms are a logical choice to sponsor open MEPs, with deep expertise and existing infrastructural capacity in the retirement plan services and asset management areas. Any concerns the Department may have with respect to permitting MEP sponsorship by financial services firms can be mitigated by using established methods for ensuring both the legitimacy and qualifications of the MEP sponsor and protection from conflicts of interest. Failure to expand the interpretation likely will result in market distortions and inefficiencies, to the detriment of retirement savers.

I. Expanded Use of MEPs Would Provide Significant Benefits

We RFI and MEP regulation relate to a 2018 Executive Order titled "Strengthening Retirement Security in America," which is intended to expand access to workplace retirement plans for American workers, particularly through MEPs.⁴ According to the Executive Order, MEPs are an efficient way to reduce administrative costs of running a retirement plan and have the potential to increase workplace plan coverage, especially among small employers. We agree that MEPs could play a key role in increasing coverage for workers at small businesses—i.e., those with fewer than 100 employees—the employer segment most in need of additional solutions to encourage retirement plan sponsorship.⁵

³ Definition of "Employer" Under Section 3(5) of ERISA—Association Retirement Plans and Other Multiple-Employer Plans, 84 Fed. Reg. 37508 (July 31, 2019) (final rule); Definition of "Employer" Under Section 3(5) of ERISA— Association Retirement Plans and Other Multiple-Employer Plans, 83 Fed. Reg. 53534 (October 23, 2018) (proposed rule). ⁴ Executive Order 13847, 83 Fed. Reg. 45321 (September 6, 2018). ⁵ According to the National Compensation Survey (March 2018), 55 percent of workers at employers with fewer than 100 workers are covered by a pension plan (DB, DC, or both), while 86 percent of workers at employers with 100 workers or more are covered by a pension plan (DB, DC, or both). The survey is available at: www.bls.gov/ncs/ebs/benefits/2018/ownership/civilian/table02a.htm. For a discussion of how pension coverage varies by US Department of Labor October 29, 2019 Page 3 of 14

Small businesses often face particular challenges in establishing and maintaining retirement plans. Studies have found that concern about administrative costs and burdens are a significant reason that more small businesses do not offer retirement plans. Small employers maintaining their own plan are required to prepare their own plan documents, summary plan descriptions and other participant disclosures, file individual Form 5500s, obtain a separate financial audit, and establish a single trust. Because of the fixed administrative costs of sponsoring a plan, small plans may not qualify for lower-cost investment options or lower recordkeeping fees. In addition to administrative and compliance burdens, smaller employers may be challenged by the fiduciary responsibility and liability of selecting and monitoring service providers and plan investment options. By joining a MEP, many small employers could band together to offer their employees access to a 401(k) plan. These plans would spare smaller employers from shouldering all the administrative costs associated with setting up and maintaining a 401(k) plan and give small plans banding together the leverage of a larger asset base to reduce investment fees for their participants. They may even encourage some small employers to offer plans because doing so would be easier (for example, the MEP provider could handle preparation and maintenance of plan documents, participant notices and disclosures, annual report filing and audit requirements on behalf of the group, rather than each employer doing these things on its own). Fiduciary responsibility for selecting and monitoring investment options and other service providers could be allocated to the MEP sponsor or a third party as well. But the Department's guidance to date generally has precluded unrelated employers from pooling assets and participants under a single plan.⁶ The MEP regulation continues to prevent the use of truly open MEPs by carrying on the "group or association" requirement,

with the limited exception of PEO- sponsored plans. The limited availability of MEPs under the final rule does little to expand coverage or improve retirement security. We urge the Department to reconsider its interpretation of the definition of “employer” under ERISA section 3(5) so that otherwise unrelated employers can participate in MEPs sponsored by well-regulated financial services firms acting in the interest of the participating employers.

II. Permitting Financial Services Firms to Sponsor Open MEPs Is Critical to Accomplishing the Executive Order’s Purpose The MEP regulation narrowly construes section 3(5) of ERISA to allow only a “bona fide group or association of employers” and a “bona fide professional employer organization” to act in the interest of plan size, see Brady and Bogdan, “Who Gets Retirement Plans and Why, 2013,” ICI Research Perspective 20, no. 6 (October 2014), available at www.ici.org/pdf/per20-06.pdf. 6 See, e.g., DOL Advisory Opinions 2012-03A and 2012-04A (guidance analyzing when an entity may establish a single ERISA plan that covers multiple employers). Most of the guidance addresses associations, but some addresses other types of organizations (e.g., financial institutions, franchises, employee leasing and professional service organizations). US Department of Labor October 29, 2019 Page 4 of 14 an employer in sponsoring a defined contribution MEP. The regulation also specifically excludes from a “bona fide group or association of employers” a group or association that is formed by a bank or trust company, insurance issuer, broker-dealer, or other similar financial services firm (except to the extent that such an entity participates in the group or association in its capacity as an employer member of the group or association). The Department must reconsider its narrow interpretation of who can act in the interest of an employer in sponsoring a plan if the regulation is to meet its intended purpose of expanding access to workplace retirement plans. Under such a reconsideration, the Department should permit financial services firms to act in the interest of otherwise unrelated employers in sponsoring a MEP. The underlying statutory language includes no such limitation on sponsorship and, in excluding this group of potential MEP sponsors, the marketplace for MEPs will suffer from a lack of competition by otherwise qualified—arguably the most qualified—plan providers.

A. The Department has broad authority to construe the meaning of “employer” As we explained in our 2018 Letter, the definition of employer under section 3(5) of ERISA does not compel the Department’s narrow interpretation that only a bona fide group or association of employers or a bona fide PEO can act in the interest of employers in sponsoring a plan. An “employer” under section 3(5) includes “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” (emphasis added). The definition by its terms includes a group or association of employers, but is not limited to a group or association of employers. In addition, the language “any person acting . . . indirectly in the interest of an employer” (emphasis added) could be interpreted much more broadly than the Department has indicated. The words “any person” reasonably could be read to include a financial services firm that is willing to act as the plan sponsor and plan fiduciary on behalf of participating employers. In the RFI, the Department requests comment on how the final rule could be reformulated to facilitate open MEPs. Question 5 states: Commenters offered two distinctly different approaches on how the current regulation could be reformulated to facilitate open MEPs. For example, some commenters recommended amending the bona fide group or association provisions by deleting the commonality and control requirements, and the prohibition on Commercial Entities. Other commenters, by contrast, recommended modifying the bona fide PEO provisions to cover Commercial Entities, but with additional or different criteria to reflect the differences between PEOs and these other entities. What are the benefits and drawbacks of each of these approaches, and are there other approaches or alternatives the Department should consider? US Department of Labor October 29, 2019 Page 5 of 14 We are agnostic as to which of the regulation’s two categories the Department

should modify to accommodate financial institution-sponsored open MEPs. The Department could expand the “group or association” category, for example, by eliminating the requirements relating to substantial business purpose, commonality of interest, and control, and the prohibition on financial services firm sponsors. None of these requirements is dictated by the statutory language of ERISA. Their elimination would allow the Department to clarify that unrelated employers may adopt a MEP sponsored by an appropriately qualified financial institution. Alternatively, the Department could justifiably determine to expand the current PEO category to more broadly encompass third party commercial entities. In the MEP regulation, the Department permits a PEO to sponsor a MEP by acting in the interest of its client employers. For this treatment to apply, a PEO must meet four general requirements: it must perform substantial employment functions on behalf of client employers; it must have substantial control over the MEP as the plan sponsor, plan administrator, and named fiduciary; it must ensure that each client employer participating in the MEP has at least one employee covered by the MEP; and it must ensure that participation in the MEP is limited to current and former employees (and their beneficiaries) of the PEO and client employers. As discussed later, while a financial services firm that is not a PEO could satisfy each of these criteria, the Department’s interpretation of what it means to perform substantial employment functions appears to be the main barrier to a non-PEO commercial entity serving in a similar role. This barrier appears arbitrary and could be eliminated with minor modifications to the applicable criteria. Finally, the Department could take an entirely different approach by establishing a separate category for financial services firms. As a legal matter, the Department is not limited to modifying one of the two categories established in the final regulation. Creating a new category for financial services firms would be equally supportable and consistent with having a separate category for state-run MEPs, as provided in Interpretive Bulletin 2015-02 (discussed further below). B. The Department’s regulation and guidance on who can sponsor MEPs unfairly and arbitrarily differentiates between financial services firms and other third-party sponsors. Regardless of which approach the Department takes, it is important to recognize that the current construct of the regulation is not compelled by the underlying statutory language and makes an arbitrary and harmful distinction between financial service firms and other third-party entities interested in sponsoring a MEP. This distinction effectively denies employers access to MEPs sponsored by providers with valuable expertise and capacity to serve this marketplace. US Department of Labor October 29, 2019 Page 6 of 14 1. PEOs and retirement plan providers have similar relationships with client employers. The differences between PEOs and financial services firms are not significant enough to warrant differential treatment under the MEP regulation.⁷ Retirement plan providers have deeper expertise and infrastructural capacity in the area most pertinent to the focus of the Department’s inquiry—running a retirement plan. As explained in our 2018 Letter, financial services firms that offer retirement plans can similarly act in the interest of client employers in sponsoring a plan and we believe that such firms can meet the four basic requirements currently applicable to PEOs. Financial services firms can satisfy the requirements related to substantial control of the plan and ensuring that coverage and eligibility standards are met. With respect to the substantial employment function requirement, interpretation is key. We understand that the Department renounced its view expressed in the proposal that the presence of a single substantial employment function performed by the PEO on behalf of client employers could alone be sufficient to satisfy the substantial employment function requirement. However, even with this change of position, the Department retained the general rule that performing substantial employment functions on behalf of client employers is a facts and circumstances determination.⁸ The offering and maintenance of a retirement plan is a substantial employment function that non-PEO enterprises can perform. This would be particularly true in the case of a financial services firm acting as the

MEP's plan administrator and named fiduciary. These are meaningful roles with significant responsibilities and liabilities otherwise assumed by the employer sponsor in a single employer plan. Furthermore, financial services firms providing retirement plan services today typically offer a wide range of services to assist employers with plan administrative functions, such as participant enrollment and education; processing of qualified domestic relations orders, loans, and other distributions; beneficiary determinations; plan document maintenance; and providing required disclosures. These services could easily carry over into a MEP offering, providing further support for the notion that non- PEO entities can perform substantial employment functions on behalf of clients. This renders arbitrary the proposal's focus on PEOs to the exclusion of other commercial enterprises like retirement plan providers. More broadly, service providers and individuals act and perform employer-type functions on behalf of employers regularly in significant ways, with such duties and responsibilities established by contract. 7 PEOs and financial services firms providing retirement plans are both for-profit enterprises that enter into client relationships with employers to provide services. 8 The MEP regulation includes a safe harbor for meeting the substantial employment functions test, which is written specifically for the typical PEO business model. We do not contend that financial institutions that are not PEOs would be able to meet the safe harbor criteria. If the Department determines to expand the PEO category to accommodate financial services firms, the Department should either modify the existing safe harbor or create an additional safe harbor for non-PEO firms. US Department of Labor October 29, 2019 Page 7 of 14 The Department's search for evidence relating to whether an entity is more or less like the "real" employer (in the criteria for when a PEO can sponsor a MEP) is unnecessary. PEOs are no more qualified to serve as MEP sponsors than other firms simply because they perform payroll functions. Like financial services firms, PEOs are business enterprises that are separate from the employer clients that hire them to perform a service or multiple services related to employment and benefits. Consequently, a PEO has no inherent representational interest with respect to the client that is distinguishable from a financial services firm hired by an employer to establish and maintain a retirement plan. Therefore, there is no rationale for maintaining this differential treatment under the MEP regulation. The Department should modify the rule, using any of the aforementioned approaches, to permit financial services firms to sponsor open MEPs. 2. The Department's narrow interpretation cannot be reconciled with its prior interpretations regarding state-run MEPs In Interpretive Bulletin 2015-02 (the "IB"), the Department took a much broader view of who can act in the interest of an employer under section 3(5) of ERISA, expressing the view that a state could sponsor a MEP that is essentially an "open" MEP.⁹ This broad interpretation of section 3(5) for states is unsupportable if the Department does not adopt a similarly broad interpretation for other would-be open MEP sponsors. As explained below, this special status conferred on state governments is unjustifiable and creates an unfair competitive advantage for states wanting to enter an otherwise private-sector marketplace. As we noted in our January 2016 comment letter relating to the IB,¹⁰ the IB appears to make unsupported assumptions about a state's qualifications, expertise, and ability to operate free of conflicts in offering private-sector retirement solutions. Moreover, in the context of a MEP, where the full range of ERISA fiduciary obligations would apply to the MEP sponsor, we see no justification for treating a would-be state MEP sponsor differently from a would-be private-sector open MEP sponsor. Both would be subject to the same consequences in the case of fiduciary breach, although in the case of a state sponsor, the Department acknowledges that state sovereign immunity laws "would have to be evaluated carefully to ensure they do not conflict with ERISA's remedial provisions."¹¹ This recognition alone suggests that the Department is not fully confident in its decision to single out states for special 9 The IB asserts that "a state has a unique representational interest in the health and welfare of its citizens that connects it to the in-state employers

that choose to participate in the state MEP and their employees, such that the state should be considered to act indirectly in the interest of the participating employers.” 80 Fed. Reg. 71939 (November 18, 2015). While this type of “unique representational interest” may distinguish a state from business enterprises that provide retirement plan services, it represents a broad interpretation of the statutory language relating to acting in the interest of employers—for only one type of sponsor that arguably does not warrant such special treatment. 10 See Letter from David W. Blass to Office of Regulations and Interpretations, January 19, 2016; available at https://www.ici.org/pdf/16_ici_dol_state_retirement_comment.pdf. 11 80 Fed. Reg. 71940, footnote 17. US Department of Labor October 29, 2019 Page 8 of 14 treatment and there does not appear to be any justifiable reason for permitting only states to sponsor open MEPs. If the rule is not expanded to permit financial services firms to sponsor open MEPs, the competitive advantage provided to states through the IB guidance could have serious consequences. At best, excluding private-sector retirement providers from the open MEP market could lead to market distortion and inefficiencies. In the worst case, government options potentially could supplant the vibrant private-sector market for retirement plan products and services. A robust competitive marketplace is crucial to the success of our retirement system, by promoting innovation, better service, and reduced costs. Providing such advantages to government options is likely to result in loss of the flexibility and innovation that characterize the current private retirement system. C. Financial services firms offer unique qualifications that make them ideal candidates to serve as MEP sponsors. The Department’s narrow final rule fails to recognize the unique qualifications and expertise held by financial services firms in the retirement savings area. We appreciate, however, that the Department is open to considering this issue further by requesting additional views through the RFI. Financial institutions have the expertise necessary to establish and maintain a retirement plan. In this regard, it is crucial that a MEP sponsor understand the laws and regulations applicable to retirement plans and be prepared to act in accordance with those principles. Financial services firms, and particularly mutual fund companies, are well acquainted with—and used to acting in accordance with—fiduciary principles.¹² If the Department determines to expand the rule as we recommend, the Department may want to establish criteria or parameters for determining which financial services firms would be permitted to sponsor a MEP. There are various options for how to define this universe that the Department could consider. One approach would be to permit trustees or issuers of individual retirement plans within the meaning of section 7701(a)(37) of the Internal Revenue Code to sponsor MEPs.¹³ Indeed, the Department has 12 All investment advisers to registered investment companies, such as mutual funds, must be registered with the SEC under the Investment Advisers Act of 1940. 13 Qualified IRA trustees and issuers include banks, credit unions, or trust companies, or entities that are licensed and regulated by the IRS as a “non-bank” trustee or custodian. Non-bank trustees and custodians are described under Treasury Regulation section 1.408-2(e). For example, a prospective non-bank trustee or custodian must file an application demonstrating that it will meet certain regulatory requirements including that it has the ability to act within accepted rules of fiduciary conduct (demonstrating business continuity, an established location, fiduciary experience, fiduciary procedures, and financial responsibility); the capacity to account for the interests of a large number of individuals; and the fitness to handle retirement funds. In addition, the IRA custodian must allow for regulatory oversight and audits. US Department of Labor October 29, 2019 Page 9 of 14 relied on this construct in the context of its Abandoned Plan Program. The Department’s Abandoned Plan regulation permits qualified IRA trustees to act as Qualified Termination Administrators (QTAs), allowing a financial institution to assume sponsorship of an abandoned plan for purposes of winding down and terminating operation of the plan.¹⁴ The Department noted that “the standards applicable to such trustees and

issuers are well understood by the regulated community and the Department is unaware of any problems attributable to weaknesses in the existing Code and regulatory standards for such persons.”¹⁵ The Department could certainly follow a similar approach for allowing financial services firms to sponsor open MEPs. Applying this approach in the context of MEP sponsorship would allow the Department to expand the availability of MEPs, while relying on established regulatory safeguards. Another approach could be to restrict the universe of financial services firms to the types of licensed and regulated financial services providers described in the exception for “transactions with independent fiduciaries with financial expertise” under the Department’s 2016 final rule defining the term fiduciary under section 3(21) of ERISA.¹⁶ Although subsequently vacated for unrelated reasons, this rule provided an exception from fiduciary status for advice to a fiduciary of a plan or IRA, with respect to an arm’s length transaction, where the plan/IRA fiduciary is (in relevant part): (A) A bank as defined in section 202 of the Investment Advisers Act of 1940 or similar institution that is regulated and supervised and subject to periodic examination by a State or Federal agency; (B) An insurance carrier which is qualified under the laws of more than one state to perform the services of managing, acquiring or disposing of assets of a plan; (C) An investment adviser registered under the Investment Advisers Act of 1940 or, if not registered as an investment adviser under the Investment Advisers Act by reason of paragraph (1) of section 203A of such Act, is registered as an investment adviser under the laws of the State (referred to in such paragraph (1)) in which it maintains its principal office and place of business; or (D) A broker-dealer registered under the Securities Exchange Act of 1934. For purposes of adapting this list to apply in the open MEP context, it would be important to add a fifth category covering:

14 29 CFR §2578.1 15 71 Fed. Reg. 20821 (April 21, 2006).
16 29 CFR §2510.3-21(c)(1) US Department of Labor October 29, 2019 Page 10 of 14 (E) other similar financial services firms (including pension recordkeepers and third-party administrators) that are affiliates, subsidiaries, or parent companies of any entity described in (A) – (D). It would be reasonable for the Department to similarly conclude that licensed and regulated financial services firms (and their affiliates) would have the requisite sophistication, fiduciary capacity, and other qualifications to undertake sponsorship of a plan on behalf of adopting employers.

D. Conflicts of interest can be mitigated through appropriate prohibited transaction exemptive relief. The RFI seeks information about potential conflicts of interest for commercial entities (including financial services firms) acting in the capacity of a MEP sponsor, rendering services to the MEP, and offering investments to the MEP. The RFI asks how these conflicts can be mitigated and whether prohibited transaction exemptions would be necessary to avoid violations of ERISA section 406 and the imposition of excise taxes under Internal Revenue Code section 4975(c). The short answer to these questions is yes—and the Department has a history of effectively mitigating conflicts through prohibited transaction relief. The Department has statutory authority to issue class exemptive relief for just this purpose¹⁷ and the need for prohibited transaction relief and conflict of interest safeguards should not prevent the expansion of MEPs and improving retirement plan coverage. The Department has a long history of dealing with conflicts of interest. It has issued numerous class exemptions that allow the marketplace to benefit from diverse and varied product offerings. For example, the Department dealt with similar conflicts in Prohibited Transaction Exemptions (PTEs) 77-3 (for in-house plans of mutual fund complexes),¹⁸ 77-4 (for a plan fiduciary’s selection of proprietary mutual funds for client plans),¹⁹ 84-24 (for receipt of commissions by a service provider to the plan),²⁰ and 2006-06 (for QTAs).²¹ These PTEs include conditions—designed to protect the interests of participants and beneficiaries—that the Department could consider importing to a new class exemption (or multiple new exemptions) for financial services firms sponsoring open MEPs.

17 Congress authorized the Department to grant administrative exemptions under ERISA section 408(a) to allow plans to engage services

integral to the plan's operation. "We conferees recognize that some transactions which are prohibited (and for which there are no statutory exemptions) nevertheless should be allowed in order not to disrupt the established business practices of financial institutions which often perform[] fiduciary functions in connection with these plans consistent with adequate safeguards to protect employee benefit plans." H.R. Conf. Rep. No. 93-1280, at 309 (1974). 18 PTE 77-3, 42 Fed. Reg. 18,734 (April 8, 1977). 19 PTE 77-4, 42 Fed. Reg. 18732 (April 8, 1977). 20 PTE 84-24 (as amended), 71 Fed. Reg. 5887 (February 3, 2006). 21 PTE 2006-06, 71 Fed. Reg. 20856 (April 21, 2006). US Department of Labor October 29, 2019 Page 11 of 14 More specifically, PTE 77-3 provides relief for the purchase or sale of mutual fund shares by an employee benefit plan covering only employees of such mutual fund company (or an affiliate). We following conditions, which safeguard the interests of participants and beneficiaries, could also be relevant in the context of open MEPs: [] We plan must pay no "investment management, investment advisory or similar fee" to the mutual fund, except in the form of investment advisory fees paid by the fund under a duly authorized investment advisory agreement; [] We plan must not pay a redemption fee when selling its shares, unless the fee is paid only to the mutual fund and the fee is disclosed in the prospectus; [] We plan must not pay a sales commission in connection with the sale or acquisition; and [] All other dealings between the plan and the affiliated fund must be "on a basis no less favorable to the plan than such dealings are with other shareholders." An exemption of broader application, PTE 77-4, provides relief for the purchase or sale by an employee benefit plan of shares of a mutual fund, the investment adviser for which is also a fiduciary with respect to the plan (or an affiliate of such fiduciary) and is not an employer of employees covered by the plan. We following conditions from the exemption include conditions similar to PTE 77-3 and other conditions specific to the facts and circumstances underlying PTE 77-4: [] We plan must not pay a sales commission in connection with the purchase or sale; [] We plan must not pay a redemption fee when selling its shares, unless the fee is paid only to the mutual fund and the fee is disclosed in the prospectus; [] We plan must pay no "investment management, investment advisory or similar fee" with respect to the plan assets invested, except in the form of investment advisory fees paid by the fund under a duly authorized investment advisory agreement; [] An independent fiduciary receives a current prospectus and full and detailed disclosure of fees paid by the plan and the mutual fund and it approves the purchases or sales; and [] We independent fiduciary is notified of any change in the fees and it approves the continued purchases or sales. PTE 84-24 provides relief for transactions involving a plan's purchase of mutual fund shares and the receipt of associated sales commissions by the mutual fund's principal underwriter. We following conditions may be relevant: [] We transaction is effected by the mutual fund's principal underwriter in the ordinary course of its business; [] We transaction is on terms at least as favorable to the plan as an arm's length transaction with an unrelated party would be; US Department of Labor October 29, 2019 Page 12 of 14 [] We combined total of all fees and compensation received by the mutual fund's principal underwriter for its services and in connection with the transaction does not exceed reasonable compensation within the meaning of ERISA section 408(b)(2); [] We principal underwriter is not a trustee (other than a nondiscretionary trustee), a plan administrator, a discretionary manager, or an employer of any employees covered by the plan; and [] We principal underwriter provides certain information, including fees and commissions, to an independent fiduciary (which may be the employer), and the independent fiduciary approves the transaction on behalf of the plan. PTE 2006-06 provides a QTA with relief for selecting itself as a service provider to an abandoned individual account plan during the termination process and paying itself for those services. Also under the exemption, a QTA may (1) designate itself as the IRA provider for distributions with respect to participants and beneficiaries who fail to make a distribution election, (2) select a proprietary investment product as the initial investment

for the IRA, (3) receive fees in connection with the establishment or maintenance of the IRA, and (4) pay itself investment fees in connection with the investment of the IRA in the QTA's proprietary investment product. To benefit from the basic service provider relief, in relevant part, the QTA's fees must: □ be consistent with industry rates for similar services, based on the experience of the QTA, and □ not exceed rates charged by the QTA for the same or similar services provided to other customers who are not plans terminated under the QTA regulation, if applicable. Additional conditions apply with respect to the IRA provider relief, including, in relevant part, that: □ the terms of the IRA are no less favorable than those terms available to comparable IRAs established outside the context of the terminating plan, □ the IRA does not pay a sales commission in connection with the acquisition of the investment product, and □ fees and expenses relating to the IRA cannot exceed those charged by the QTA for comparable IRAs established outside the context of the terminating plan and cannot exceed reasonable compensation under Code section 4975(d)(2). These PTEs illustrate how the Department has approached these types of conflicts. Depending on the arrangement, similar PTE conditions could be used for an exemption for a financial institution selecting itself to provide services to a MEP that it sponsors and selecting proprietary investment products for the MEP. The appropriate safeguards will depend on how the MEP arrangement is structured and the role of the financial institution sponsor. The Department should seek to develop US Department of Labor October 29, 2019 Page 13 of 14 appropriate conditions that protect participants and beneficiaries, while fostering a robust competitive marketplace for open MEPs. Finally, in its consideration of whether to allow open MEPs, the Department should recognize that association-based MEPs and PEO MEPs are not necessarily without conflicts of interest. Such MEP arrangements could in fact raise concerns with respect to recordkeeping and other service fees, revenue sharing, and even proprietary investment options. Nevertheless, the Department apparently has become comfortable with addressing conflicts in these contexts and there is no reason it cannot do so here. E. Without changes, the MEP rule will have little impact on coverage Without expansion of the MEP regulation as we have recommended herein, it is unlikely to significantly expand retirement plan coverage. As explained above, the rule excludes a significant and qualified segment of the potential universe of MEP sponsors by prohibiting financial services firms from sponsoring open MEPs, which will negatively impact the health and vibrancy of the marketplace for MEPs. In addition, many small employers and self-employed/non-traditional workers will be left without access to the MEP structure because they either are not part of a bona fide group or association of employers or do not contract with a PEO for services. This access problem likely will be most acute for self-employed individuals, independent contractors, "gig" workers, and the like, since PEO plans by definition will not be an option, and these workers may be less likely to belong to a bona fide group or association as defined by the proposal. Financial institutions are in a unique position to make a difference for this segment of the workforce by offering a practical means to gather individuals into a MEP structure, with higher contribution rates than IRA-based plans. In excluding financial services firms, the rule will not fully realize the promise and potential of MEPs. * * * We Institute appreciates the opportunity to comment on the RFI. We support the Department's efforts to expand availability of MEPs in the retirement plan space and urge the Department to go further, well within its authority under ERISA, to permit financial services firms to sponsor open MEPs. Such an expansion would have the potential to significantly increase coverage under workplace retirement plans and improve overall retirement savings adequacy. US Department of Labor October 29, 2019 Page 14 of 14 If you have any questions about our comment letter, please feel free to contact David Abbey (202-326-5920 or david.abbey@ici.org) or Elena Barone Chism (202-326-5821 or elena.chism@ici.org). Sincerely, /s/ David Abbey /s/ Elena Barone Chism David Abbey Elena

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