ERISA Advisory Council
U.S. Department of Labor

Hearing on Outsourcing Employee Benefit Plan Services

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Statement for the Record

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Executive Summary

The upcoming discussion on fiduciary outsourcing, and how this could affect coverage, is an important one. 'Multiple Employer Plans' (MEPs) and 'Open MEPs®' come up in these conversations, as these structures have proven to be well organized efforts to aggregate the outsourcing of discretionary fiduciary services related to defined contribution retirement plans of unrelated employers. This aggregation has enabled small employers to cost effectively access expert fiduciary knowledge; obtain access to a wide variety of reasonably priced investment options; and to receive a level of administrative services which are not otherwise available to such employers.

The DOL's Advisory Opinion 2012-04 has forced vendors to reconsider the use of MEPs to provide such outsourced aggregated services. TAG Resource's experience in establishing a MEP for unrelated employers, and then having to unwind such a MEP in order to comply with the DOL's Advisory Opinion, provided it with valuable insight on such outsourcing.

This statement makes the point that the aggregation of outsourced services to unrelated employers can be well performed under existing DOL guidance outside of MEPs. We believe that fundamental changes to the MEP rules (as outlined by the Advisory Opinion) are therefore ill advised and likely to be counterproductive, as such changes may cause a myriad of unnecessary regulatory, technical, enforcement and administrative difficulties.

We do suggest that the major regulatory roadblock to the effective aggregation of outsourced services is the current iteration of the Form 5500. Changes to the 5500 as recommended herein will remove the roadblocks to providing cost effective services to the small and mid-sized plan market, while enhancing ERISA's protection of participant rights under such aggregation programs and MEPs.

Statement of Troy Tisue

My name is Troy Tisue and I'm the President of TAG Resources, in Knoxville Tennessee. We were one of the original pioneers in the so-called "Open MEP" movement, first implementing a multiple employer 401(k) plan for unrelated employers in 2004. As you may know, our MEP model resonated with a lot of people— and our model is still discussed today. We created the Open MEP ® to address coverage— namely, by removing the obstacle that prevented small employers from offering plans. From a coverage perspective, the Open MEP® worked— 40% of our plans were start-ups; these companies cited cost and liability (the relief from, respectively) as the reason they chose to adopt our plan. Note that term "Open MEP®" is actually a registered trademark of TAG Resources.

The upcoming discussion on fiduciary outsourcing, and how this could affect coverage, is an important one. No doubt, 'MEPs' and 'Open MEPs®' will come up in the conversations, as these have proven to be viable outsourcing solutions which has also served to increase small plan coverage. TAG's recent work and experience in this area might prove helpful to this discussion.

Market pressures resulted in TAG approaching the DOL in 2012 for an Advisory Opinion on the treatment of the Open MEP® as a single plan under ERISA. The size of the MEP had become substantial, and important distribution partners needed assurances on its treatment under ERISA. The DOL was unable to provide such assurances, and advised instead that there must be a "common nexus or other genuine organizational relationship that is unrelated to the provision of benefits" in order for a MEP to be treated as a single plan. The DOL also noted in the opinion that the participating employers must exercise direct or indirect control over the plan.

The Advisory Opinion, obviously, caused TAG to engage in a review similar to that which this Council is now conducting. We concluded that what the market was demanding was a cost effective way to increase coverage in the small plan market; to provide "scale" in investment pricing and plan administration to plans for which it was otherwise unavailable; and to provide relief to small employers from increasingly complex fiduciary responsibilities.

Existence of MEP Alternatives

What we finally realized was that a MEP is not necessary to achieve these goals, and that a package of plan services can be designed to effectively mimic the services provided to a client under a MEP. A MEP aggregates services and investments to a number of unrelated employers by the common authority granted under a single plan document adopted by each participating employer. The same could be accomplished by aggregating those same services outside of a MEP, but by the common authority granted by coordinated language in separate plan documents (though those documents may be part of a mass submitter, and thus the operative language can be the same) adopted by each employer participating in the non-MEP arrangement.

Relying upon traditional ERISA concepts related to the delegation of authority (see ERISA Section 402, 405 and ERISA Regs 2509.75-4, 2509.75-8), the delegation of authority under a plan can be "packaged" in a number of different ways which are best suited to both the vendor sponsoring the program and the clients it serves. The arrangements also can be designed so that the small employer delegate certain settlor functions to the service provider.

By paying close attention to the details related to the manner in which authority is granted, and to which party bears what authority, the client services and investments can be cost effectively aggregated.

Because of this, TAG changed its role with all former MEP clients to that of a Plan Administrator to whom was also delegated certain non-Plan Administrator fiduciary authority (under 3(21) of ERISA) necessary to provide the services previously provided under the MEP. This changed the MEP to what we call the 'MEAP' (Multiple Employer Aggregation Program). The MEAP structure allowed us to effectively run the clients' plans, but with a few key changes worth noting: less risk, adherence to current (clear) laws, and greater accountability. In short, what emerged was an aggregated (or shared services) model that retained the efficiency of the Open MEP®, but offered the accountability of single employer plans. We have attached a whitepaper which describes this approach in the context of a PEO.

The efficiency of MEPs is what drew us to them in the first place— it is hard not to see what they could offer in terms of 'coverage'. But the Aggregated Model I just described offers the same advantages under current regulations, while making sure participants in these plans are fully afforded protections under ERISA.

MEPs, in our experience, are not transparent, and can provide a vehicle for bad acting employers to hide. There is no reporting to the IRS or DOL of employer sponsors in a MEP; there is no reporting of the bad acting employer which does not make timely deposits-or even fail to make deposits at all; and there is no ability for the investigators within the various DOL regions to conduct periodic reviews of the individual employers' oversight of the MEP. With all of the emphasis the regulatory agencies are putting on accountability, the lack of transparency in MEPs is clearly a negative.

The real issue

Experience has taught us that the issue that this Council needs to address is not whether there needs to be a change in the MEP rules. Though we are amenable to changes in the those rules, we do not believe that a fundamental change to the DOL's approach to MEPs is necessary to accomplish the goal of increasing coverage for small plans. Significant changes to the rues defining MEPs will, instead, cause a myriad of unnecessary regulatory, technical, enforcement and administrative difficulties. We have found that merely focusing on the MEP definition to be an inappropriate nod to thoughtless inertia.

The solution is much simpler than that. We believe that the only regulatory changes which need to be made to effectively support outsourcing are to the Form 5500 (and, under IRS purview, the Form 5330). The current iteration of the 5500 serves as the only substantial DOL roadblock to cost effectively aggregating services for small employers, while maintaining ERISA protections.

The marketplace already provides for common documents through the IRS's mass submitter programs; investment vendors already provide a variety of methods by which to aggregate investments of unrelated employers; and service provider technology already permits administrators and professional fiduciaries to aggregate their services to plans of unrelated employers. What the market does not have the ability to do is to change the current Form 5500 requirements.

We therefore recommend that the Form 5500 be changed to permit unrelated employers whose plans are under common administration with a common Plan Administrator to elect to file an aggregated Form 5500 with others within the same arrangement. This would include both the MEPs which meet the DOL's existing rules, as well those arrangements with common administration outside of a MEP. The Plan Administrator would be required to file for each employer, regardless of size, information similar to that found in the Form 5500SF. The arrangement, as a whole, would be required to file a consolidated audit and financial statement as currently provided under Schedule H.

We recognize that such changes to the Form 5500 would require substantial effort at a time of limited resources. However, it is a much less burdensome task than attempting to incorporate all of the changes which would occur with a fundamental change in the MEP rules. These recommended Form 5500 changes would further encourage adoption by small employers, while enhancing the DOL's ability to protect participant rights under ERISA.

Transition relief needed

We recognize that a number of existing MEPs do not meet the existing guidance set forth under the Advisory Opinion, but that the unwinding of a MEP is a difficult task. We therefore recommend that the DOL adopt a transition program for those existing MEPs which choose to unwind, including transitional enforcement relief.

Agenda Points

The following provides our responses to the Council's specific agenda points, in addition to being generally addressed in the written statement:

A. Identifying current industry practices and trends regarding the types of services being outsourced (both fiduciary and non-fiduciary) and the market for delivery of those services, including differences in outsourcing practices by type of provider, plan size or plan type.

There is currently a great deal of confusion in the marketplace regarding the packaging of outsourced of fiduciary and non-fiduciary services, there currently being no standardized practices. The differences do not necessarily depend on type of provider. It depends more on the provider's target market, and the vendors own comfort with taking on the risks related to any particular service provided.

The successful vendors specifically identify which statutorily defined (by ERISA and the Code) "Plan Administrator" services they choose to provide; which non-Administrator discretionary fiduciary services they will provide; which non-fiduciary ministerial services will be provided; and which settlor function will be assigned to them. Their contract will typically allow each class of services to be separately terminated.

B. Clarifying the legal framework under ERISA for retaining outsourced service providers, including both plan sponsor and service provider responsibilities, and suggest areas where further DOL guidance might be helpful

The existing DOL's guidance on allocating responsibilities is sufficient to support current activities in the marketplace. However, it would be useful to update 2509.75-4 and 2509.75-8 to "modernize" and broaden their language and examples to make them more easily applicable to current conditions.

C. Making recommendations to DOL about current best practices in selecting and monitoring outsourced service providers, including identification of performance standards, benchmarking of costs and mitigating conflicts of interest;

We believe that the diversity in the marketplace will make it extraordinarily difficult for the DOL to develop meaningful standards related to "best practices." In that ERISA requires *prudence,* not benchmarking, we believe it is well beyond the scope of the DOL's mandate to attempt to develop such standards.

D. For fiduciary services, exploring the differences between status as a fiduciary under ERISA section 3(16), 3(21) and ERISA section 3(38) and the scope of co-fiduciary liability in the outsourcing context

We believe that ERISA, and the regulations promulgated thereunder, are clear in their delineation of the differences between fiduciary authority under 3(16), 3(21) and 3(38). However, it would be helpful for the DOL tom "package" a description of the manner in which these terms differ in formal guidance, such as in a Field Assistance Bulletin.

E. Identifying current contracting practices with respect to outsourced services, including provisions such as termination rights, indemnification, liability caps, service level agreements, etc. that might assist plan sponsors and other fiduciaries in negotiating service agreements

The combining of fiduciary, ministerial and settlor services requires a comprehensive document outlining the rights and responsibilities of all of the involved parties. However, there are few such comprehensive agreements currently in existence in the marketplace from which to draw any sense of current practices.

It is critical, however, that the employer engaging in such practices fully understand that they will retain a "residual" of ongoing fiduciary responsibilities, including the monitoring of the outsourced service providers. They do not get a "free pass" on fiduciary responsibilities, though these services are often marketed in a manner which may lead them to believe this.

The successful vendor provides the participating employer with enough support and information to fulfill its obligation to review.

F. Examining insurance coverage and ERISA bonding practices of outsourced service providers to assist in understanding the extent to which risks are shifted from plan sponsors and other fiduciaries to service providers

A number of insurers are beginning to write both fiduciary insurance and ERISA bonds on an aggregate basis, including covering the fiduciary's and plans' exposures when providing professional fiduciary services to unrelated plans.

A TAG Whitepaper

FIXING THE MEP

Using an Aggregation Program to Manage the "ASO" Risk in the PEO Multiple Employer Plan

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Contents

PEOs, ASOs and MEPs

The Department of Labor's (DOL) Advisory Opinion on Multiple Employer Plans (MEPs), Advisory Opinion 2012-4, caused a stir in the Professional Employee Organization (PEO) industry. This is because of a bit of history: the Internal Revenue Service's (IRS) issuance of a Revenue Procedure in 2001 appeared to give a green light to establishing multiple employer 401(k) plans in these types of businesses without conditions other than those outlined in Rev Proc 2002-21. In that the IRS ruling was a result of several years of negotiation between PEOs and the IRS, it left many with the impression that 401(k) MEPs were free to set up as single plans without much regard to additional standards which may be imposed by the DOL. It seemed reasonable to assume that the DOL was well aware of the IRS's ruling, and the significant efforts which were associated with its issuance. The DOL's silence looked to represent acquiescence.

The new Advisory Opinion from the DOL in 2012 provided guidance which imposed further standards on MEPs fully a decade after the IRS's Revenue Procedure, and has now caused PEOs to assess their own MEP models. The question each PEO has to consider is whether, and to what extent, their own business models can meet the requirements outlined by the DOL. They each find themselves considering whether or not there is sufficient commonality between their employer clients, and whether or not those clients have enough direct or indirect control over the MEP, to qualify for single plan treatment by the DOL under the Employee Retirement Income Security Act (ERISA).

There is no easy way for PEOs which sponsor plans covered by ERISA to answer this question. Because of the nature of the PEO industry, there really is no single definition of a PEO which covers all of the industry's business models. PEO offerings are as varied as the marketplaces they serve. Any particular PEO may offer any range of employment-related service levels in its book of business. These can include complete co-employment services, where the PEO takes on substantial employment responsibilities for the employees of their clients including the authority to hire and fire employees, or can include services as minimal as payroll or training services. It is this range of service levels, often within the same PEO, which makes it difficult for the DOL to provide PEO specific guidance on the MEP's which these organizations may offer.

There is one service level within their business, however, that PEOs can and should address. That is something labeled here as the Administrative Services Only ("ASO") arrangement. This can best be described as a PEO selling its services -- often on an *a la carte* basis -- to employers who may not need the full range of employment related services they offer. The IRS's 2001 Revenue Procedure did not differentiate between these types of a la carte service levels and the core business of the PEO. In that the "commonality" test for single plan status under a MEP is conducted on an employee by employer basis, there may be little argument that these types of clients will fail to meet that test because of the limited nature of their employment relationship. These clients, however, are still sometimes offered the opportunity to participate in the PEO's MEP.

This means that, regardless of the position any PEO may want to take with regard to the nature of their own business and whether or not it is covered by the DOL Advisory Opinion, there will be some concern that those employers for which ASO services are being provided may fail the DOL's "commonality" test for being part of a single plan.

There is a way to mitigate this risk, while also providing to those ASO clients the advantages of scale for 401(k) products and services. This is done by implementing an aggregation program which provides much of the benefits, with fewer of the risks, found in a MEP. This method could also be used by PEOs which may be looking for an alternative to a MEP in their main line of business as well.

The Aggregation Model

By using the aggregation model described below, PEOs may be able to continue to service the ASO client with a 401(k) plan cost effectively. This is done by establishing new, individual plans for their clients, and aggregating their services to that group of clients in a way which ultimately has a much more favorable risk profile for both the client and the PEO.

An Aggregation Program (which we'll refer to as AP) can be designed to effectively mimic the services provided to the client under the MEP. A MEP aggregates services and investments to a number of unrelated employers by the common authority granted under a *single* plan document adopted by each participating employer. An AP aggregates those same services, but does it by the common authority granted by coordinated language in *separate* plan documents (though those documents may be part of a mass submitter, and thus the operative language can be the same) adopted by each employer participating in the AP.

The AP works by taking a different approach to what has become "standard" authority allocation language in plan documents. Going back to ERISA's statutory language, the delegation of authority under a plan can be "packaged" in a number of different ways, and often in ways which are different from the standardized combinations to which we have generally become accustomed over time. By paying close attention to the details related to the manner in which authority is granted, and to which party bears what authority, the PEO may be able to find a way to continue to serve those ASO clients in a favorable manner.

Comparative Advantages and Disadvantages of the AP Model

AP Advantages.

A well-developed AP has a favorable risk profile when compared to a MEP -- both for the "aggregator" (the firm which aggregates the services) and for the participating employer.

Both the AP and the MEP aggregate services, in very similar ways. A MEP sponsor, however, generally needs to manage and control a number of particular risks to both itself and the participating employer when aggregating. These are risks which generally do not have to be addressed when dealing with aggregating services by way of a series of single employer plans under an AP. The following compares the key risk elements:

Advantages of the AP Model	
MEP	**AP**
ERISA "Single plan" uncertainty.	
The Advisory Opinion introduced significant uncertainty over the application of the ERISA "single plan rules" to any PEO sponsored MEP, and there are no clear guidelines for the PEO to follow. "Single plan" status is based on the specific facts of any given business model; certainty will only arising for any given PEO should it seek the issuance of its own DOL Advisory Opinion approving its particular model. For the participating employer, it is bearing the risks related to the MEP not being recognized as a single plan. To the PEO, particularly those with the ASO elements described above, the uncertainty makes it difficult to market the MEP.	The AP program has no such uncertainty: the arrangement is set up in such a way that each employer is sponsoring a single employer plan -- though a valid MEP can participate in an AP with other plans
"One bad apple" exposure.	
One badly acting employer within a MEP can disqualify the entire plan. This has always been one of the leading concerns employers have had about joining a MEP. MEP sponsors generally address this risk well. But while the IRS's corrections program, EPCRS, recognizes the ability to fix just the discreet problem caused by that one badly acting employer, that program still requires that the employer pay the cost of the EPCRS fix. This can sometimes be costly for the MEP sponsor, as the sponsor will need to bear that cost if the bad acting employer does not. The risk is exacerbated by the fact that there is no IRS guidance, informal or otherwise, which permits a MEP to protect itself by disgorging the bad acting plan. Without such guidance, which does not appear likely to come, spinning off that plan from the MEP does not serve to save the MEP from disqualification	Each employer stands on its own in the AP. The disqualification of one plan will not serve to disqualify the other participating plans and, most importantly, the aggregator will not be liable for funding the expenses for fixing the disqualified plan. The aggregator also reserves to itself the ability to terminate its services with a bad acting employer, including the termination of its fiduciary authority.
Counting Service.	
A MEP is required to count an employee's service with each of the MEP's participating employers for purposes of eligibility and vesting service. In addition to the obvious administrative challenges this causes in the larger MEP, it can also be a surprise to the participating employer who may now need to fully vest a new employee.	Service with differing employers within the AP does not need to be counted; each employer stands alone. This simplifies administration for the aggregator, while not surprising participating employers with unexpected vesting.
Removal of Plans	
Among the most difficult of tasks with which a MEP must deal are those related to circumstances under which an employer must be removed from the plan. There are a variety of circumstances under which this will occur, and virtually all of them will entail an uncooperative or non-existent plan sponsor. Forcing the removal of an employer from the MEP requires a unique blend of settlor and fiduciary functions, and creates significant risk management challenges for the MEP sponsor. Though plan language permitting this is common in the well-drafted MEP document, implementing the removal can often provide to be logistically difficult.	Unwinding an employer from an AP is much simpler and is based upon the rules which currently exist for terminating a plan, terminating a service contract, or dealing with an orphaned plan. The AP would use well established and recognized procedures in dealing with such circumstances. The design of the AP should give authority to terminate the plan under certain, identifiable instances.
Joint Liability.	
The DOL has taken the position that the act of joining any particular MEP by an employer is a fiduciary act. This means that each adopting employer is a co-fiduciary to the plan, with potentially hundreds of other employers. This raises the unknown specter of the extent of co-fiduciary liability.	The AP's aggregator, instead, is separately appointed by each participating employer as a fiduciary to its own plan; there is no fiduciary connection between these employers. Though the aggregator may be liable to each plan, one plan will not be potentially liable for fiduciary breaches under other plans in the AP
The IRS's Single Plan Rule	
The IRS's treatment of a MEP as a single plan is conditioned upon all of the assets of the plan being available to pay all of the benefits of the plan. Though this is an archaic rule which appears to have been designed for defined benefit plans, defined contribution plans are specifically subject to this rule. There is little guidance from the IRS on how this rule will apply to a 401(k) MEP, especially when applying forfeitures or ERISA account funds	This is not an issue with regard to plans in an AP. Each AP plan is a single plan and, though its assets may be comingled with other plans for investment purposes, its assets are used solely for that plan's purposes.
Securities Law.	
A number of attorneys have raised the question of whether or not a MEP still qualifies for the exemption from securities law registration which is otherwise enjoyed by 401(k) plans.	In that AP plans are single employer plans, this concern does not apply.

The AP Disadvantage.

There are disadvantages to the AP approach when compared to MEPs which must be considered if choosing to transition the ASO (or any part of the PEO's) business. An aggregator generally needs to manage and control a number of issues which are particular to the AP, and not a MEP. The following compares those elements:

Disadvantages of the AP Model

MEP	AP
Form 5500 and Audit	
A MEP only requires a single Form 5500, and the audit costs are shared between all of the participating employers.	Each employer under the AP will need to file a Form 5500. Each employer with 100 or more participants must also arrange for, and file, an audit of the financial statement. This is essentially a cost issue, which can be managed under an AP through the aggregation of financial, administrative and investment information. Depending on how the authority is allocated under a program, the aggregator can be also given the authority to sign the Form 5500 as the Plan Administrator.
Documents, Contracts and Processes	
A MEP's operations are generally well established in the marketplace. Plan document terms for volume submitters will not need to be modified to provide for preparation allocation of authority.	An AP utilizes a non-traditional approach to allocating of authority, which requires supporting plan documentation which is often fundamentally different than that which has been required in the marketplace for MEPs. This means that adopting the AP approach also requires a review of established processes and procedures to make sure they match up with the allocation of authority needed to properly operate the AP. Though each plan is separately contracting with the service providers, they are doing it through authority granted to the single aggregator.
Audit Exposure.	
A MEP is merely a single plan. Its chances of undergoing a regulatory investigation are the same as that as any single employer plan, even though there may be hundreds of employers in the plan.	An AP can be a large collection of individual plans, each of which has a separate regulatory "footprint." Just because of the volume of separate filings made on behalf of participating employers in the AP, the likelihood that any given plan in the program will be subject to DOL or IRS investigation is substantially greater than with a MEP
Investments.	
A MEP's investments do not operate under the constraints of aggregating investments. It can invest as does any single employer plan. The key for the MEP is having an adequate recordkeeping system which can track investments on an employer-by-employer basis.	Aggregating investments under an AP is necessary in order to obtain the related advantages of scale. However, doing this as part of an AP requires the use of specific vehicles under which unrelated employer plans are permitted to comingle their assets. This requires the investment vendor to be familiar with the substantial body of law which governs such arrangements, and their reporting requirements. Improperly comingling these assets can result in a violation of the Prohibited Transaction arrangements. A properly structured arrangement may include the use of pooled separate accounts within a group annuity contract, if that product's design accommodates aggregation of plans under it.

Single 413(c) Plan, Multiple ERISA Plans

Some have proposed that a solution would be to treat the a MEP arrangement as a single plan for purposes of the Tax Code under Section 413(c), while treating that same plan as multiple plans for purposes of ERISA. The legal problem with this is that 413(c) of the Code --which outlines the tax rules applicable to MEPs -- imposes the requirement under Code Section 414(l) that all of the assets of the plan be available to pay all of the benefits under the plan. If this requirement were applied to an ERISA collection of plans, it would violate the ERISA rules that a plan's assets only be used to pay for the benefits of that single plan. Complying with the IRS rule in order to make the arrangement a single MEP under the Code would therefore cause each of the "multiple" ERISA plans to violate ERISA.

Key Features in Establishing the AP.

The successful transition of ASO (or any PEO) business to an AP is dependent in large part on the design of the program matching well with the business model of the PEO. The AP is driven by the careful allocation of fiduciary and administrative responsibilities which, like the MEP, can vary widely depending upon the manner in which the PEO chooses to do business.

The PEO should first become familiar with the rules governing the proper allocation of authority under ERISA. The rules for allocating responsibility can be found in the ERISA regulations at 29 CFR 2509.75-8(11), as well as at ERISA Section 405(c); and the allocation of other authority (such as certain settlor functions, like the ability to amend the plan document) relies upon application of traditional contract and agency principles. Under CFR 2509.75-8(11), all of the authority of the plan need not be in a single party, and it can be split up between the aggregator and the plan sponsor. The aggregator will need to decide what authority it will take on, and what will remain with the plan sponsor.

Specific Legal Roles under ERISA and the Code.

It is important for the PEO to re-familiarize itself with the actual definition of the legal roles under ERISA and the Code in order to successfully transition its ASO business. Marketplace jargon often used in describing certain functions of "plan governance" need to be ignored and replaced with specific knowledge of the actual application of the rules.

- **Named Fiduciary**. This is a role which is required to be in every plan, which is little understood, and is generally not widely used properly. It simply refers to the fact that the plan document must name at least one fiduciary; but any fiduciary actually named in the document is actually a "Named Fiduciary." This will be a fiduciary as defined under 3(21) of ERISA, a section which covers far more than just investment advice. If only one fiduciary is named in the document, that fiduciary then is effectively in complete fiduciary control of the plan.

  ERISA Section 402(a) requires a plan "instrument" (note that it does not necessarily need to be the plan document itself) to name "one or more" persons which has the authority to control and manage the operation of the plan. Note that this does not have to be the "Plan Administrator;" that the person so delegated merely falls within the category of "fiduciary" under ERISA 3(21); and can be a named fiduciary. The "named fiduciary" needs to be either named in the plan document or appointed by the employer by a procedure within the plan.

  The Plan Administrator is actually a Named Fiduciary under the plan, where the party (such as the employer) is specifically named as such-typically in the definition section or the adoption agreement to a plan.

- **Plan Administrator.** This is likely one of the most overused terms in the marketplace, and is often used without recognition of the specific legal responsibilities which attach to it under both the Code and ERISA. Plan documents routinely allocate to the Plan Administrator a number of other fiduciary roles which are technically those of an ordinary Named Fiduciary. For example, though it is a Plan Administrator which must make a QDRO determination, any fiduciary -- named or otherwise -- can make a determination on a hardship distribution because such is not legally a Plan Administrator function.

The PEO, in its role as aggregator will need to specifically identify each of the legal functions of the Plan Administrator, and then which of those functions it will be willing to perform. One of the most significant decisions will be whether or not to accept the responsibility of signing as the Form 5500 as the Plan Administrator.

- **Investment Fiduciary.** One of the advantages of the AP is the ability to aggregate investments of the unrelated employer, which is discussed more fully below. The effective AP requires the aggregator to have the authority to actually perform this task. Though much has been made of the difference between the "3(21) Investment Advisor" and the "3(38) Investment Manager," the "Investment Fiduciary" is one that can be designed using ERISA's general fiduciary allocation provisions to provide a much broader investment function -- or a more limited one -- should the aggregator so decide. The Investment Fiduciary will become a Named Fiduciary under the document (and be defined under 3(21) of ERISA) and will need to have the authority to appoint, not only the advisor and manger, but also appoint the trustee or enter into an annuity contract on behalf of the plan. Because of these roles, the design of the compensation received for these services becomes particularly sensitive and is discussed below.

- **Hiring and Firing Service Providers.** The aggregator will also need to have the authority to hire and fire service providers to the plan (though it, itself is also a service provider). This is a Named Fiduciary function under the plan, though the typical plan document applies it to the Plan Administrator.

- **Responsible plan fiduciary.** The new 408(b)(2) service provider disclosure rules have created a new fiduciary designation, the "Responsible Plan Fiduciary" (RPF). The aggregator will be the RPF for the service providers it hires and fires, while the plan sponsor will be the RPF for the aggregator.

Settlor Functions.

In addition to the allocation of fiduciary responsibility that needs to be properly implemented under ERISA, the AP requires selective allocation of certain settlor functions from the plan sponsor to the aggregator. Some of these, like the ability to amend the plan and under what circumstances, can be built into the plan document. However, because the circumstances may vary from AP to AP and not be able to be accommodated by a volume submitter document, this authority is best reserved to a separate document between the plan sponsor and the aggregator. The aggregator will also need the ability to terminate the plan under specified circumstances.

Transitioning to the AP

The method by which a plan transitions ASO clients from a MEP to a single plan is wholly dependent on the terms of the MEP, and the authority which is given to the MEP lead sponsor. Should the MEP plan documents provide the MEP sponsor with the ability to amend the document to perform this type of task, it can be a relatively straightforward task to do so and to sign documents which will serve as the ongoing plan document. To the extent that a plan amendment by the Lead Sponsor is not possible, the Lead Sponsor will need to explore the ability to spin off the plans related to each affected employer under the existing terms of the document. This process may, however, require the signature of each affected employer, as it is critical to come out of the process with properly signed plan documents.

Each MEP will be different, and so the documents necessary to transition ASO clients off of the plan will need to be reviewed closely to see the precise method of performing the transition. The process needs to accommodate not only the separation into a single plan, but will also need to support the delegation to the aggregator of the authorities needed to properly perform the AP function.

Investment Vehicles under the AP

Being able to aggregate investments is really at the core of the AP, thereby providing those virtues which attach to scale:

- A variety of non-proprietary funds;
- Well-priced share classes; and
- A number of services not typically provided to small plans.

This is also the most significant challenge for the aggregator. It requires a cooperative investment vendor which has the legal structure and recordkeeping system which can accommodate pooled investments while servicing a large number of individual plans under a single investment arrangement. This can be a logistically difficult for many platforms.

The insurance company pooled separate account, contained within a group annuity contract, is ideally suited to an aggregation program. This is because the underlying separate accounts are already well designed to properly accommodate a large number of unrelated plans from both a recordkeeping and compliance standpoint. These non-registered contracts also have a great deal of flexibility in pricing, and the underlying investments typically hold favorable share classes. The AP needs an insurer that has the recordkeeping capabilities to treat all of the plans in the AP as a single plan for pricing purposes, and which is able to provide scale pricing by treating all of the plans in the AP as a single plan for pricing purposes.

Collective trusts are also well suited as an investment vehicle, where a net asset value (NAV) platform is desired for the investment platform. The key challenge is the controls within the investment system, whereby all of the employers in the AP are limited to investments in order to achieve the scale necessary to the benefit of a well-priced share class. The TPA's recordkeeping system would also need to accommodate the special needs of an AP.

Compensating the Aggregator

As in a MEP, particular attention needs to be paid to the design of compensation in the AP. The aggregator will be both a service provider and a fiduciary whose compensation needs to be disclosed to, and approved by, the participating plan sponsor. The aggregator cannot act unilaterally in determining its own compensation nor can its compensation vary dependent upon the investments within the fund. It will not have the authority to direct compensation to an affiliate, unless such is approved by the plan sponsor. Revenue sharing and ERISA Accounts can all accommodate aggregator compensation, as long as the employer approves the arrangement, and that the aggregator does not have the discretion to perform actions which will serve to change its compensation formula.

Commission compensation will generally be unavailable because of the aggregator's investment fiduciary status, but asset-based service compensation can be designed to work. The Registered Investment Advisor (RIA), however, will need to exercise extreme care when designing its compensation if it is also the aggregator because of the difficulty of being responsible for giving investment advice to the plan while also being the "Investment Fiduciary."

The aggregator will also have the authority to decide upon compensation of the plan's service providers. Caution will also need be exercised when performing that function, as the opportunity to split compensation is limited.

The PEO which chooses to move all or part of its business to an AP can well accommodate these requirements within its service contract with their clients.

Summary

The Aggregation Program is founded on well-established plan principals, but uses a non-traditional approach in the manner in which it allocates fiduciary authority. It does provide the PEO the opportunity to manage its ASO risks, with the results being a more manageable 401(k) offering with less risk for the PEO and its clients.

About TAG Resources, LLC . . .

TAG Resources, LLC ("TAG") is a leading US retirement services company based in Knoxville, Tennessee. Our mission is to provide all employees the opportunity to retire—this means constructing better programs and tools to achieve a fully-funded retirement. TAG has a culture of innovation that is unique in the retirement industry. TAG pioneered the concept of leveraging the aggregation of small companies to better the service-pricing models. This aggregation method challenged the industry practice of over pricing retirement plans for small employers. TAG's experience in leading the industry on Multiple Employer Plans includes enhancements that have made working with 401(k) plans easier than ever before.