Statement of the U.S. Chamber of Commerce

ON: Retirement Plan Options for Small Businesses

TO: Subcommittee on Primary Health and Retirement Security of the U.S. Senate Committee on Health, Education, Labor, and Pensions

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Statement on
RETIREMENT PLAN OPTIONS FOR SMALL BUSINESSES
Roundtable Discussion before the
SUBCOMMITTEE ON PRIMARY HEALTH AND RETIREMENT SECURITY
of the
UNITED STATES SENATE
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS
on behalf of the
U.S. CHAMBER OF COMMERCE
Wednesday, October 28, 2015

The U.S. Chamber of Commerce would like to thank Chairman Enzi and Ranking Member Sanders, and members of the Committee for the opportunity to participate in today's Roundtable Discussion on Retirement Plan Options for Small Businesses. I am Scott Anderson, owner of Static Peak, LLC in Jackson, Wyoming. Static Peak is a media company that aggregates and reports on community news. Like many other businesses in Wyoming I am a micro-business – my company has two employees, including me. I am here today representing the U.S. Chamber of Commerce of which I am a member of the Board of Directors and sit on the Small Business Council.

The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector and region. Over ninety-six percent of the Chamber members are small businesses with fewer than 100 employees.

The topic of today's hearing—Retirement Plan Options for Small Businesses—is of significant concern to Chamber membership. Many small employers, like larger employers, offer benefits to their employees. These small businesses want to continue offering benefits but have their own unique issues. Other small businesses would like to start retirement benefits but face significant burdens. As a business owner who would like to offer retirement benefits, I am very familiar with the hurdles of doing so. In addition, as a past Chairman of the Jackson Hole Chamber of Commerce, I have interacted with thousands of other small and micro-businesses facing these same hurdles. As such, the Chamber believes that this is a critical topic to address and appreciates the opportunity to share our concerns and recommendations in response to the questions you have asked.

1) What are some policy recommendations you can offer which would open up multiple employer plans to allow small businesses more flexibility?

The Chamber views Multiple Employer Plans (MEPs) as another tool to encourage small businesses to implement retirement plans. MEPs offer an attractive and cost-efficient alternative for small businesses for which a stand-alone 401(k) plan is not feasible. MEPs allow for the pooling of resources to allow small businesses to tailor provisions in the plan in a way that

wouldn't be possible in a prototype plan. The Chamber believes that MEPs can reach a potentially different audience than other plans designs because organizations (such as state Chambers) would be able to offer them to members. Thus, the use of MEPs could be expanded through trade associations and other organizations that work closely with small businesses.

The greatest advantage of the MEP is the centralized functions that the MEP sponsor can provide. Costs are shared among the adopting employers, regardless of the number. For example, one plan administrator, trustee and named fiduciary can act for the entire MEP. The MEP can provide centralized payroll, one investment line-up and one annual report and audit for the entire plan. This translates to substantial economies of scale and cost efficiencies over stand-alone plans for small businesses.

However, there are also significant disadvantages to participation in a MEP. The biggest of these is that every employer is jointly liable for the qualification failures of every other employer in the MEP. This liability can be a daunting hurdle for many employers. In addition, some employers may be discouraged by the inability to find a MEP sponsor or by the notice and disclosure requirements that are not completed by the plan administrator.

Changing several of the rules regarding MEPs could significantly expand their use. For one, the Chamber recommends the implementation of safe harbors for MEP sponsors and adopting employers that would immunize them from non-compliant adopting employers. In addition, we recommend that MEP reporting and disclosure obligations under ERISA be simplified. Further, the Chamber recommends that the IRS and DOL clarify that "employer commonality" is not required to establish a MEP. While the Chamber believes that there is no basis to apply this requirement to MEPs, there is sufficient ambiguity to create reluctance on the part of the employers who might otherwise consider participation in a MEP.[1]

2) What could the federal government be doing to encourage small businesses to help employees with retirement savings?

There is no silver bullet that will resolve the issues of retirement coverage and savings. However, the Chamber believes that there are significant steps that policymakers can take to increase plan sponsorship and participation among small businesses.

[1] Under ERISA's definition of an "employer" that can sponsor a retirement plan, the independent provider of a MEP can be construed as a person "acting indirectly" in the interest of an employer in relation to an employee benefit plan, and a group of participating employers can be reasonably construed as a group of employers acting in such capacity. (ERISA section 3(5). By way of contrast, in two often-cited ERISA Advisory Opinions, the DOL found that certain organizations that were not organized primarily for the purpose of providing retirement benefits, and were open to membership by individuals and other non-employers, were not bona fide groups of employers, and therefore, were not employers under ERISA. (*See*, ERISA Adv. Op. 83-15A (March 22, 1983); and ERISA Adv. Op. 88-07A (March 28, 1988). Thus, the Chamber believes that these Advisory Opinions can be differentiated in cases in which the "members" must be employers.

Enhance the Small Business Tax Credit. Enhancing the current small businesses tax credit for 401(k) startup costs would also encourage greater plan formation. The credit is allowed for the first three years of start-up costs of a new small business retirement plan (with fewer than 100 participants) of up to 50 percent of the first $1,000 (i.e., $500) in startup administrative and retirement-education expenses.[2] The current credit is too small and short-lived to change behavior. Lawmakers should consider expanding the credit and making it refundable to increase the incentive for small businesses to set up 401(k) plans.

Give Small Businesses a Dedicated Voice on Advisory Councils. Small businesses play an important role in the debate over the effectiveness of the voluntary employer-provided system; therefore, it is important to increase their representation in the debate. The advisory councils to the DOL, IRS, and PBGC are important sources of input to those agencies. However, none of them have a seat specified for small business. An important way to increase the voice of small business in the discussion of the employer-provided system is to have a small business representative on each of these advisory councils. As members of these advisory groups, small business representatives could work within the agencies to continue to find ways to encourage plan sponsorship among small businesses.

3) Please elaborate on any current regulatory or statutory challenges you have experienced (or observed) offering retirement plans to your employees in your small business.

Small businesses members have stated that the Chamber cannot over-emphasize the need for simplification and a reduction in unnecessary regulatory requirements in the current retirement system. Small businesses are focused on running a business; therefore, anything that avoids increasing their liability and decreases their administrative burdens is important. In addition, stability, predictability and consistency among the regulatory agencies would go a long way toward encouraging greater participation in the private retirement system.

Eliminate Top-Heavy Rules. The top-heavy rules are an unnecessary burden on employers that want to offer a 401(k) plan but are not inclined or are unable to provide a matching contribution.[3] Under current requirements, if a key employee makes a deferral and the plan is top-heavy, it triggers a 3% required contribution for non-key employees.[4] In addition, the deferrals made on behalf of family members of key employees are attributed to the key employee; thereby increasing the likelihood of triggering the top-heavy contribution. Because these rules directly affect the decision-makers and owners in the company, they may effectively deter the implementation of the plan, which would have benefited all employees. [5]

[2] I.R.C. section 45E.
[3] A qualified retirement plan that primarily benefits key employees—a top-heavy plan—can qualify for tax-favored status only if, in addition to the regular qualification requirements, it meets several special requirements. A retirement plan is top heavy if more than 60% of the plan's assets are attributable to Key Employees.
[4] I.R.C. § 416(g); Treas. Reg. § 1.416-1, Q M-7.
[5] I.R.C. § 416(i)(1).

The Chamber believes that the top-heavy rules are unnecessary since the contributions are already subject to average deferral percentage (ADP) testing to ensure equanimity between highly-paid and non-highly-paid employees. Therefore, we believe the top-heavy rules should be eliminated. If they are not eliminated, we recommend that the rule be modified to encourage greater implementation and maintenance of retirement plans. For example, eliminating the requirement that deferrals made by family members be attributed to the key employee would be extremely useful.[6]

Simplify Discrimination Testing. Another step policymakers could take is to simplify the average deferral percentage ("ADP") test for nondiscrimination. For example, a plan would not pass the ADP test if a) non-highly compensated employees' contribution percentage is less than 6%, and b) the contribution percentage of highly compensated employees is 200% or more of that amount. If non-highly compensated employee contributions exceed 6%, then the plan would pass the ADP test.[7]

Streamline Notice Requirements and Allow for Greater Use of Electronic Disclosure. Consolidating and streamlining certain notice requirements would make retirement plan sponsorship more attractive for all business and small businesses, in particular. Currently, plan sponsors and participants are overwhelmed by the disclosure requirements. This feeling is particularly acute for small businesses that may not have a human resources department to focus on notice requirements.[8] Furthermore, the notice requirements do not occur in a vacuum. Most employers that offer a retirement plan also offer other benefit plans such as a health care plan; therefore, employers are also subject to those notice requirements. Additionally, employers are required to provide many other notices outside of the ERISA context.

In general, the Chamber recommends a congressional review of all retirement plan notices under ERISA and the tax code to determine where there is overlap and duplication. The following are specific recommendations that we offer at this time:

- Eliminate the notice for the 3% nonelective safe harbor. While it may have intended to serve a policy purpose at one time, it appears to serve no purpose today.
- Include the 401(k) safe harbor match information in the Summary Plan Description rather than it remaining as a stand-alone notice.
- Replace quarterly investment statements with annual notices for participants who have internet access to their investment account information.

There are many more notices that can be consolidated or eliminated. A thorough congressional review could identify many ways of relieving unnecessary administrative burdens

[6] Another recommendation is to revise the rule so that, if a plan were top heavy, the eligible participants to receive the benefit would be only participants who meet the age and service requirements under Code section 401(a)(4) and 410(b) rather than all eligible individuals who remain employed on the last day of the plan year regardless of the amount of hours worked in the plan year.

[7] Another alternative is to use the nondiscrimination rules under Code section 403(b)(12) which are based on eligibility rather than utilization.

[8] Roughly 95% of small businesses have 25 employees or fewer. In addition, many do not have a human resources department or a CFO. Consequently, small businesses may not have management personnel who can effectively deal with the volume of notice and disclosure requirements.

of little or no marginal utility while ensuring that participants receive information that is meaningful and relevant.

In addition to consolidation and elimination, it is important for regulators to recognize the benefit of electronic delivery. Moreover, we believe that it is critical that the Department of Labor, Treasury and the PBGC create a single, uniform electronic disclosure standard.

To start, the Chamber recommends that the Department of Labor's safe harbor for the use of electronic delivery of required disclosures be changed in accordance with the guidance provided under Field Assistance Bulletin 2006-3.[9] Field Assistance Bulletin 2006-03 provides that with respect to the furnishing of pension benefit statements, good faith compliance is met if the disclosure is provided in accordance with Treasury regulations.[10] The Treasury regulations provide that information may be provided electronically without consumer consent provided that the "electronic medium used to provide an applicable notice must be a medium that the recipient has the effective ability to access." The Treasury standard differs from the Department of Labor standard in that the ability to effectively access the electronic medium is not required to be in a location where the participant performs their job duties and use of the medium does not have to be an integral part of those duties.

Beyond this initial step, we recommend that the Department of Labor change its standard for electronic delivery to encourage the use of electronic delivery and to allow, for those plan sponsors that wish, that electronic delivery be the default delivery option for benefit notices. The Chamber believes that modernizing the restrictive rules on electronic delivery in this manner is a critical element in the larger task of reforming employee benefit plan notice and disclosure requirements. These changes can allow for the provision of important information without it being submerged in an avalanche of rarely used information.

In conclusion, the Chamber encourages action by policymakers that will encourage small businesses to participate in the employer-provided retirement system. We look forward to working with this Committee and Congress to forward ideas that will encourage further plan sponsorship and participation by all businesses and small businesses in particular. Thank you for your consideration of this statement.

[9] The safe harbor rule is found under ERISA section 2520.104b-1(b).
[10] Field Assistance Bulletin 2006-03 requires compliance with Treasury regulation section 1.401(a)-21.